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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-5339

GEORGE S. EDWARDS,
Petitioner,

versus

STATE OF TENNESSEE and BROOKS McLEMORE,
Attorney General of the State of Tennessee,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of Tennessee

LUCIUS E. BURCH, JR.
CHARLES F. NEWMAN
DeWITT M. SHY, JR.
BURCH, PORTER & JOHNSON
130 North Court
Memphis, Tennessee 38103
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Tennessee

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The Petitioner, George S. Edwards, prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of Tennessee filed in these proceedings on May 17, 1976, affirming the conviction, and the opinion and judgment filed on July 19, 1976, denying the Petition to Rehear.

OPINIONS BELOW

The judgment of the Criminal Court of Shelby County, which is unreported, appears in Appendix A, p. A-1.* The judgment and opinion of the Tennessee Court of Criminal Appeals at Jackson, which is unreported, appears at Appendix B, p. A-3. The judgment and opinion of the Supreme Court of the State of Tennessee is unreported, and appears at Appendix C, pp. A-24. The opinion of the Supreme Court of Tennessee denying the Petition to Rehear appears at Appendix D, p. A-58.

JURISDICTION

The judgment of the Supreme Court of the State of Tennessee was entered on May 17, 1976. See Appendix C, pp. A-24-25. A Petition to Rehear was denied by the Tennessee Supreme Court on July 19, 1976. See Appendix D, p. A-58. This Petition for Certiorari is being filed less than ninety days from the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

FEDERAL QUESTIONS PRESENTED

I. Whether Petitioner's conviction is so devoid of evidentiary support as to render it unconstitutional under the Due Process Clause of the Fourteenth Amendment, because the state failed, as a matter of law, to prove beyond a reasonable doubt that Petitioner was sane at the time of the crime and with respect to the crime.

II. Whether Petitioner was denied a fair trial and due process, in violation of his rights under the Fourteenth Amendment, because the Trial Court's instructions to the jury failed to properly instruct the jury as to the reasonable doubt standard and its application.

* The Appendix to this Petition for Writ of Certiorari is printed in a separate volume.

III. Whether Petitioner was denied a fair trial and due process because the Court failed to instruct the jury properly as to the application of the so-called M'Naghten Rule, in that the Court several times stated that portion of the M'Naghten Rule relating to the ability to distinguish right from wrong without stating that portion of the Rule relating to knowledge of the "nature and quality" of the act.

IV. Whether Petitioner was denied a fair trial and due process because the jury was instructed to determine whether the presumption of insanity had been overcome or remained in the case at the end of the proof, when the presumption of sanity had, prior to the conclusion of the state's proof, and certainly prior to the end of the trial, been overcome as a matter of law and the state was, by that time, as a matter of law, clearly under the burden of proving beyond a reasonable doubt that the Petitioner was not legally insane at the time of the act and with respect to the act.

V. Whether Petitioner was denied a fair trial and due process because the Court refused to instruct the jury as to the meaning, effect and consequences of a verdict of not guilty by reason of insanity and prohibited Petitioner's attorneys from discussing this subject, during *voir dire* and argument.

RAISING OF THE FEDERAL QUESTIONS

The Federal Questions Presented were raised in the following manner:

Federal Question I was raised in the Trial Court by Petitioner's motion for a directed verdict at the conclusion of all the

proof (T., 627[1]) and by Petitioner's written Motion for Judgment Notwithstanding the Verdict or a New Trial, filed on March 22, 1973, under Grounds 1-3, 7-10, 14-15, 29-30, and 36. See T., Vol. I, pp. 29ff, and Appendix E, pp. E A-59-62, A-65-67. The Trial Court overruled both motions.

On appeal to the Tennessee Court of Criminal Appeals, Petitioner made the same contentions in its Brief in Assignments of Error 1-3, 7-10, 14-15, 29-30, and 36. See Appendix F, pp. A-68. With respect to Assignments of Error 1-3, the Court held that the evidence was legally sufficient. Court of Appeals Opinion, pp. 3, 6; Appendix B, pp. A-8-12. The Court overruled Assignments of Error 7-10, stating that "[I]t was permissible to ask Mrs. Owensby about the basis for her opinion, including the statements of others and plaintiff in error himself." Court of Appeals Opinion, pp. 4, 6; Appendix B, pp. A-9-12. With respect to the lay testimony (Assignments of Error 14-15), the Court held "that the lay witnesses were properly allowed to testify". Court of Appeals Opinion, pp. 4, 6; Appendix B, pp. A-9-12. Assignments of Error 29 and 30 dealing with the jury instructions as to expert and lay testimony were overruled, the Court stating that ". . . the jury was properly instructed to receive the expert testimony with caution" and ". . . the Trial Court properly preserved the distinction between lay witnesses and expert witnesses . . ." Court of Appeals Opinion, pp. 5-6; Appendix B, pp. A-10-12.

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[1] Reference to the Transcript will made throughout this Petition by the letter "T", followed by the number of the page referred to. The Volume will be included in the reference only in the case of reference to Volumes I and II and Volume VII, which have separate pagination, and to Volume VIII which contains the Exhibits. Therefore, if no Volume is referred to, it may be assumed that the page referred to is in Volumes III through VI of the Transcript.

Reference to the Appendix pages will be made throughout this Petition by the letter of the particular appendix followed by the number of the page referred to within this particular appendix.

The Petitioner raised these contentions in its Petition for Writ of Certiorari in the Tennessee Supreme Court in Assignments of Error 1-3, 7-10, 14-15, 29-30 and 36. See Appendix G, pp. A-84. The Supreme Court rejected these contentions in its Opinion at pp. 7-13, 16. See Appendix C, pp. A-31-36, A-37.

Federal Questions II, III and IV were raised in the Trial Court by Petitioner's Motion for Judgment Notwithstanding the Verdict or a New Trial under Grounds 27, 28, 31, 32, and 36. See Appendix E, pp. A-65-67; T., Vol. I, p. 29ff. The Trial Court overruled this Motion.

On appeal to the Tennessee Court of Criminal Appeals, Petitioner made the same contentions in its Brief under Assignments of Error 27, 28, 31, 32, and 36. See Appendix F, pp. A-80-83. The Court rejected these contentions stating "[t]he charge as given fully and fairly states the law as insanity, both as to the burden of proof and the M'Naghten rule, and these assignments are without merit". See Court of Appeals Opinion, p. 5, 6; Appendix B, pp. A-11-12.

In the Tennessee Supreme Court, Petitioner again made the same contentions in its Petition for Writ of Certiorari in Assignments of Error 27, 28, 31, 32 and 36. See Appendix G, pp. A-95-96, 97-99. The Supreme Court affirmed the opinion of the Appeals Court stating, ". . . we have considered the assignments anew and find ourselves in full agreement with the Court of Criminal Appeals that the charge given by the trial court was complete and accurate." Supreme Court Opinion, p. 16; Appendix C, p. A-38.

Federal Question V was raised in the Trial Court by Special Requests for instructions to the jury, by objections to the Court's charge to the jury, and in Petitioner's Motion for Judgment Notwithstanding the Verdict or for New Trial under Grounds 4, 8, 11, 16-21, and 36. See Appendix E, pp. A-59, 63, 67. The Trial Court overruled the Motion.

On appeal to the Tennessee Court of Criminal Appeals, Petitioner made these contentions in its Brief in Assignments of Error 4, 8, 11, 16-21 and 36. See Appendix F, pp. A-69, 70, 71, 75-78, 81. The Court rejected these contentions. With respect to Petitioner's attempt to discuss the meaning and effect of a verdict of not guilty by reason of insanity during *voir dire* (Ground 4), the Court stated that ". . . the trial court did not abuse his discretion in controlling the extent of the *voir dire* examination." Court of Appeals Opinion, pp. 3, 6; Appendix B, A-9, 11. The Court held that Mrs. Owensby's testimony alluding to the consequences of a verdict of not guilty by reason of insanity was properly admitted. Court of Appeals Opinion, pp. 4, 6; Appendix B, pp. A-10, 12. The Court also rejected the Petitioner's contention that the Trial Court erred in allowing the state's Attorney to imply in his argument that the Petitioner would go free upon a verdict of not guilty by reason of insanity. Court of Appeals Opinion, pp. 4, 6; Appendix B, pp. A-10, 12. Finally, the Court rejected Petitioner's claim that the Trial Court erred in failing to charge the Special Requests setting forth the meaning and the consequences of a verdict of not guilty by reason of insanity, stating that the Petitioner "cites no Tennessee authority requiring a trial court to so instruct the jury, . . ." Court of Appeals Opinion, pp. 5, 6; Appendix B, pp. A-10, 11.

In the Tennessee Supreme Court, Petitioner raised these contentions in its Petition for Writ of Certiorari in Assignments of Error, 4, 8, 11, 16-21, and 36. See Appendix G, pp. A-85, 87-88, 91-94, 98. The Court discussed and rejected these contentions in its Opinion, at pp. 13-16. See Appendix C, pp. A-36-38.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the assistance of Counsel for his defense."

Constitution of the United States, Amendment XIV, § 1:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF THE CASE

The Petitioner, George S. Edwards, was indicted for first degree murder in the shooting of his sister. At trial the Petitioner contended that he was not guilty by reason of insanity at the time of the commission of the act. The jury found him guilty of murder in the second degree, sentencing him to ten years in prison. The Petitioner filed a Motion that he be granted a judgment of not guilty by reason of insanity, notwithstanding the verdict, or in the alternative that he be granted a new trial, assigning numerous errors at trial. This Motion was overruled by the Trial Court and the Petitioner appealed. The Tennessee Court of Criminal Appeals at Jackson, Tennessee, affirmed in a two to one decision, Judge O'Brien dissenting. On a Petition for Certiorari the Supreme Court of Tennessee affirmed the conviction in a three to two decision, Justice Henry and Justice Fones dissenting. A Motion to Rehear was denied by the Tennessee Supreme Court in a three to two decision, Justice Henry and Justice Fones dissenting. The case is before this Court on a Petition for Writ of Certiorari. The facts material to the consideration of the questions presented are as follows:

The Petitioner had a long history of very serious mental illness prior to the killing and came from a family in which

there was much mental illness. An uncle died in Western State Hospital. Two cousins were receiving psychiatric treatment at the time of the trial, and the Petitioner's mother is an unstable individual who had made two attempts on her life. T., 296. On the paternal side, a grandmother died at Whitfield, which is the Mississippi insane asylum. A great-uncle died while a patient at Veterans Hospital at Murfreesboro, Tennessee, and a grandfather was in a psychiatric institution in Memphis. T., 297.

For many years prior to the shooting, the Petitioner was introverted, quiet, very lonely and insecure. T., 76. He was a "loner". T., 77. He was dependent upon his mother to an unusual and very noticeable degree. T., 78-79. Witnesses who had known him for years testified that he never had a single close friend, T., 231, and that, if the Petitioner was close to anyone, it was to his deceased sister, Betty, the victim of the murder on which the instant case is based. T., 93.

After his marriage, friction developed between the Petitioner and his wife's children, and became progressively worse. T., 79. He was very domineering, tyrannical, and cruel to the eldest stepdaughter, T., 73, and took sadistic pleasure in forcibly cutting his stepson's hair. T., 74. Business and family pressures increased as a result of the wife's development of a malignancy and he seemed unable to deal with those pressures. T., 80. In September, 1971, part of the Petitioner's business territory was taken away from him and given to his wife's ex-husband, and this had a very depressing effect upon him, T., 84, causing the wife to go to the Family Service Bureau with her daughter to seek help. T., 84. It was then apparent to her that the Petitioner was "sick". T., 87. There was a bizarre episode in October, 1971, which resulted in a separation between the Petitioner and his wife and the institution of divorce proceedings by her. They were reconciled on the express condition that he seek psychiatric help. T., 69-70.

The wife went to the minister of her church, the Reverend Daly Thompson, with her problem, and he recommended that she see a psychiatrist, Dr. Parks Walker, as a result of which the Petitioner became a patient of Dr. Parks Walker in November, 1971. T., 87-88.

In January, 1972, new evidence of cancer was found in the wife and the Petitioner became even more depressed and spoke frequently of suicide. T., 88.

For several weeks before the shooting, the Petitioner was so depressed and withdrawn that he stopped doing any work whatever, and on the Wednesday before the shooting he was in such a state of depression that the wife insisted that he go to see Dr. Walker, the psychiatrist, again. T., 90-91. As she described his condition:

> "He withdrew completely. He didn't want to be around people. He even withdrew from the family. Usually when he would be depressed—he never wanted to be around people much anyway, but he even withdrew from the children. And the last three weeks he didn't do much of anything but eat and sleep. He may read a little bit but that was really about all." T., 92.

On the night of the shooting, his sister Betty's presence was unanticipated and unexpected. T., 92-93. After she arrived, the Petitioner gave her a can of beer and entered into a conversation and "everything was amiable and everything seemed fine." T., 47. After a short while, the wife went into the house for an emery board and the Petitioner followed, closing the door and locking out his sister. T., 47. It was the wife and not the Petitioner who went back and admitted the sister. T., 93-94. The wife and the sister then went in the bathroom to find some nasal spray and when they both walked into the bedroom together, the Petitioner was lying on the bed and, without a word, he got up and turned to the chest of drawers and opened a drawer and took out the

gun and pointed it past his wife, avoiding her, and shot his sister. T., 48-49. The wife's spontaneous actions and outcries immediately following the shooting confirmed that she believed the Petitioner to be insane at the time of the act. She exclaimed: "Get back from the window. Turn out the lights. That man is crazy." T., 123. And the first person to be called at the wife's request was Dr. Parks Walker, the psychiatrist. T., 115.

When the arresting and investigating officers arrived, the Petitioner made conflicting and obviously irrational statements. He said, "My wife shot herself." T., 165. This statement was made when his wife was alive, next door, and the pistol had been opened and there were three spent and two live rounds lying on the bed. T., 168. He repeated the contention that his wife had shot herself. T., 175. His eyes were glassy and there was no appearance of intoxication. T., 186. He next stated that he shot his sister "because she had sinned too much" and "She was better off now dead." T., Vol. VIII, Exhibit 16 and T., 191-194. The arresting officer noticed the sick or inappropriate grin, T., 195, 203, which the wife had noticed for the three or four months preceding the shooting. T., 96-97. This is objective evidence of the disease of which he was diagnosed as suffering. T., 408-413.

The deranged condition of the Petitioner was obvious to everyone having dealings with him. Mr. Rinkes noticed that the Petitioner was a loner and would not mix with the other salesmen at the sales conventions. T., 368. By January, 1972, his condition had deteriorated so that within a five-minute span he would seem quite normal and immediately thereafter attempts at conversation would be met with a glassy stare, T., 369, and he became antagonistic to his fellow salesmen. T., 369. In February Rinkes made a special trip to Memphis for the purpose of talking with the Petitioner's father about his condition. He inquired if the father had noticed anything different about his son and was informed that the Petitioner was under

psychiatric care. T., 371. The condition was so noticeable that other salesmen would say, "What is wrong with George?" T., 372.

Reverend William Mullins is the Associate Minister of St. John's United Methodist Church. T., 375. A part of his duties is counseling and he is especially trained as a counselor, having studied psychology and psychiatry, and both the Petitioner and his wife were members of his church. T., 375-376. On the morning before the day of the shooting, he had a conversation with the wife as to her anxiety concerning her husband's condition and that afternoon he went by the house, accompanied by his secretary, to observe the Petitioner. T., 377, 378. The Petitioner was withdrawn more than he had ever seen him before. He had a beady stare. A smirk, or funny smile. He was very noncommunicative. Very withdrawn. T., 378. Reverend Mullins immediately realized that the Petitioner needed psychiatric help and was beyond counseling. T., 384.

The Reverend Daly Thompson, who is the Minister of St. John's United Methodist Church, had earlier attempted to counsel with the Petitioner and his wife but recognized that the matter was beyond counseling and referred the Petitioner to Dr. Parks Walker, the psychiatrist. T., 396.

Dr. Parks Walker is a practicing psychiatrist, trained at the University of Tennessee. T., 400. He first saw the Petitioner on November 4, 1971, at the request of the Reverend Daly Thompson. T., 402. At that time, it was Dr. Walker's opinion that the Petitioner had personality problems of long standing. T., 402. He had a paranoid type of personality. T., 402, 403. His condition had deteriorated to the point that he was actually psychotic when first seen by Dr. Walker and was diagnosed as suffering from schizophrenia. T., 403. He was placed on a strong drug, a major tranquilizer, used primarily for people with psychotic conditions. T., 404-405. He seemed

improved somewhat until January when he went into a depressive state. T., 405. He was then put on an antidepressant type of drug and seemed to respond to it somewhat. T., 406, 407. However, in March, 1972, "He still had some of the symptoms of schizophrenia, symptoms of peculiar bodily changes, like he felt he had a hole in his chest with blood running out and numbness in his feet, feeling of being unreal." T., 408. These are symptoms of schizophrenia. T., 408. The Petitioner exhibited classic symptoms of schizophrenia—bizarre ideas, ambivalence, disturbance in the expression of his emotions—doing and saying things inappropriate to the circumstances (including the sick and silly grin which so many witnesses noticed)—inability to maintain a train of thought, and autistic thinking. T., 408-413. Schizophrenia is a disease which is subject to fluctuation. T., 413.

Dr. Walker last saw the Petitioner prior to the shooting in May, when he was quite depressed. T., 413 ff. He had not been working for three weeks prior to the consultation and had not been taking his medication—just lying around the house in a morose, deeply depressed state. T., 414. He was put back on medication and told to return in two weeks — the doctor having the intention of putting him in the hospital if he was not improved. T., 414. After the shooting, he was confined in the Psychiatric Unit of the John Gaston Hospital where he became afraid to talk with Dr. Walker. He expressed suspicions that his attorney was working against him. These are typical examples of paranoid thinking. T., 416. An acute psychotic episode developed when medication was withdrawn and the Petitioner became extremely fearful—thought he heard sounds in the vents—thought he heard people crawling through the vents—thought he heard his dead sister's horn outside—and became so excited that he set fire to the mattresses. T., 416.

It was the unqualified opinion of Dr. Walker that, at the time of the killing, the Petitioner was insane under the so-called M'Naghten Rule. T., 418.

The other psychiatrist offered by the Petitioner is Dr. G. H. Aivazian. Dr. Aivazian is superlatively trained. He holds a Rockefeller Foundation fellowship in psychiatry, is a member of the American Board of Psychiatry, and is Chairman of the Department of Psychiatry at the University of Tennessee, College of Medicine. T., 458, 459. He had an excellent opportunity to examine the Petitioner, who was confined in the John Gaston Hospital Security Unit, which is a part of the teaching complex of the University of Tennessee. Dr. Aivazian also had access to the entire medical record, consulted with Dr. Parks Walker, and Dr. Allen Battle, and personally examined the Petitioner on seven separate occasions between June 12 and August 14, 1972. T., 460, 461. His conclusion was that the Petitioner was suffering from schizophrenia, which he described as a very serious psychosis. T., 462.

Dr. Aivazian testified that inappropriate responses, such as a grin or smile, are physical manifestations of schizophrenia, T., 466, and that predisposition to schizophrenia is hereditary. T., 469. It is a fluctuating disease with periods of improvement when symptoms are mild or nonapparent and periods of exacerbation. T., 474. It was his opinion that on the night of the shooting George Edwards was psychotic to the degree that he was insane under the M'Naghten Rule. T., 475-476. His diagnosis is not borderline but is a very, very firm, clear decision. T., 480.

Dr. Jacob Norman Fidelholtz, the head of the Forensic Services Division at Central State Psychiatric Hospital, (where Petitioner was sent by the Trial Court for a determination of his capacity to stand trial), had testified at a pre-trial hearing in the case and had given highly favorable testimony for the Petitioner. He had testified that neither he, Fidelholtz, nor any member of his staff had an opinion as to whether or not the Petitioner was psychotic on the night of the shooting and that the psychiatrists who had access to the Petitioner immediately following the

shooting would be in much better position to give an accurate diagnosis than would Dr. Fidelholtz and his staff, who did not see the Petitioner until some months after the shooting. T., Vol. VIII, Exhibit 18 (transcript of hearing of November 2, 1972), pp. 8-9, and T., 665-667, 669-670. The only witness tendered by the State as an "expert", Mrs. Nona Owensby, was one of the members of Dr. Fidelholtz' staff. She was not a doctor and did not have sufficient medical qualifications to allow her to prescribe medication. T., 593-4, 623, 632-3.

After the trial in this case, and after the decision of the Tennessee Court of Criminal Appeals, Mrs. Owensby was made the subject of an investigation by a Special Committee named by the Commissioner of the State Department of Mental Health, Dr. C. Richard Treadway, and Mrs. Owensby was, on the basis of the findings of the Committee, discharged as an employee of the State of Tennessee. Appendix H, pp. A-100-101, 115. As is set forth in Appendix H, pp. A-100-101, the Special Committee made the following specific findings, among others, with respect to Mrs. Owensby's conduct:

1. "That she exceeded her authority in testifying before the courts on matters of . . . insanity".

2. "That she flagrantly exceeded the authority of her license as a psychological examiner".

3. "That she failed or refused to pursue clarification of the extent of her licensed authority when this was brought to her attention, and continued her activities".

4. "That she furnished courts, defense attorneys, and District Attorneys with 'Qualifications as an Expert Witness' containing information that was inaccurate and misleading, implying professional education and capabilities exceeding those actually possessed."

5. "That she considered herself competent to counsel, evaluate and perform all duties without supervision and did so."

6. "That she held herself out to be a psychologist by using her 'working title' as an indication of professional qualifications, tending to mislead courts before [whom] she gave testimony."

The Committee also found that the State's job description of Mrs. Owensby's position did not correspond with the capabilities specified by the Board of Healing Arts when it licensed her.

On July 29, 1974, one week after the opinion of the Court of Criminal Appeals was filed, Dr. Treadway, State Commissioner of Mental Health, issued Mental Health Rule and Regulation 53-74, a copy of which appears in Appendix I at pp. A-117-118. This Rule and Regulation clearly states that, "Any employee of or consultant to the Tennessee Department of Mental Health who testifies as an expert witness in a criminal case as to the issue of the defense of insanity, must have earned the Ph.D. degree in clinical psychology and must be licensed to practice in the State of Tennessee in accordance with the provisions in Title 63, Chapter 11 of the Tennessee Code Annotated, or must be a psychiatrist, who is licensed to practice medicine in the State of Tennessee in accordance with the provisions of Title 63, Chapter 6 of the Tennessee Code Annotated, and has completed a psychiatric residency in an accredited program". Obviously Mrs. Owensby's testimony would have been in conflict with this Rule and Regulation, had it been in effect at the time of the trial.

As stated previously, the information concerning Mrs. Owensby's conduct prior to and at this trial, did not become a matter of public knowledge and was not known to Petitioner or his attorneys until after the opinion of the Court of Appeals was delivered. Upon discovery of this information, and as a result of a conference between the Attorney for the Petitioner, the Attorney General, and the Advocate General of the State of

Tennessee, the Advocate General, in a letter dated September 24, 1975, agreed to suggest to the State Supreme Court that the material regarding Mrs. Owensby filed by Petitioner's attorney with the Court should be considered by the Court:

> "General Ashley and I have discussed this case and have concluded that we have a responsibility to the Court to advise them concerning the misrepresentation of qualifications by Mrs. Nona Owensby at the trial, and would suggest that even though the material you have filed in that regard is *de hors* the record, that the Court, because of the unusual circumstances, should consider it. If you have no objection, I would like to make that announcement to the Court prior to your opening argument on the merits."
>
> Appendix J, pp. A-119-120.

Pursuant to this agreement, the Attorney General made this suggestion in a preliminary statement to the Tennessee Supreme Court, and thereafter repeated it in response to remarks made by Judge Fones, during argument. And so that there could be no possible gap in the record of the case, in a letter dated November 7, 1975, the Attorney for the Petitioner wrote the Clerk of the Supreme Court of Tennessee requesting the written undertaking to be filed and distributed to each member of the Court. This entire correspondence between the Attorney for the Petitioner, the Attorney General, the Advocate General, and the Clerk of the Tennessee Supreme Court is included in Appendix J at pp. A-119-123.

Despite these attempts by both parties to the action the Tennessee Supreme Court refused to consider or appropriately respond to the urgings of the Petitioner concerning the conduct of Mrs. Owensby at trial.

Over the repeated objections of Petitioner, Mrs. Owensby was allowed at the trial to testify as an "expert" rebuttal witness for

the State after the conclusion of the Petitioner's proof. She testified that in her opinion the Petitioner did know right from wrong on the date of the shooting. T., 625. She diagnosed him as suffering from a "schizoid personality" with alcohol addiction. T., 629 Although she claimed to have personally interviewed the Petitioner, she was unable to state when she interviewed the Petitioner or produce a single record of an interview. T., 630.

Mrs. Owensby admitted that the entire time the Petitioner was at Central State Hospital he was medicated with thorazine, which is a strong antipsychotic drug, a major tranquilizer. T., 633:

> "Q. And though you say this man had nothing but a personality disorder, he was on a strong anti-psychotic drug and a major tranquilizer all this period that he was up there and subject to that drug when all these observations were made?
>
> "A. Yes.
>
> "Q. That is true, isn't it?
>
> "A. That is true."
>
> T., 633.

The record which Mrs. Owensby had available, which came to the hospital with the patient, reflects that when thorazine had been withdrawn, while the Petitioner was at the John Gaston Hospital, he relapsed into a psychotic state and began to hallucinate. Although she expressed the "opinion" in her testimony that the Petitioner was not psychotic on the date of the shooting, on cross-examination she admitted that in a prior conversation she had stated that she did not have an "opinion". Her own notes produced at the trial reflected a "question" rather than an "opinion", exactly as she had previously stated in verbal

conversation. T., 644-645. Moreover, she admitted that in a prior conversation she had stated that the examination was concerned with the question of "present insanity" and not insanity at the time of the shooting. T., 651.

Dr. Fidelholtz, head of the Forensic Services Division of Central State Hospital who was referred to above, was called in surrebuttal when the State and the Court declined to call him as a witness. T., 664 ff. His qualifications were admitted by a stipulation by the State. T., 665. As indicated above, he stated that neither he nor any member of his staff (including, presumably, Mrs. Owensby) had expressed an opinion as to whether the Petitioner was psychotic on the date of the killing. T., 665-666. He said that in his opinion the Petitioner had "the ingredients to have a psychotic break, possible a schizophrenic break under duress or under a lot of stress." T., 666. He testified that Dr. Aivazian and Dr. Walker had a much better diagnostic opportunity than anyone at Central State. T., 666-667.

No witness in the case suggested a sane reason or motive which this man might have for slaying his sister, to whom of all persons he had been closest throughout his life. Neither in its proof nor, indeed, in argument did the State suggest a sane reason for the killing and none can be found in the record other than in the workings of a diseased mind.

REASONS FOR GRANTING THE WRIT

I

Petitioner's Conviction Is So Devoid of Evidentiary Support as to Render It Unconstitutional Under the Due Process Clause of the Fourteenth Amendment, Because the State Failed, as a Matter of Law, to Prove Beyond a Reasonable Doubt that Petitioner Was Sane at the Time of the Crime and With Respect to the Crime.

A. **A conviction which is devoid of evidentiary support is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.**

In *Thompson v. City of Louisville*, 362 U.S. 199 (1960), this Court said:

> "The ultimate question presented to us is whether the charges against the petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the due process cluase of the Fourteenth Amendment."
>
> 362 U.S. 199, at p. 199.

The Court concluded:

> ". . . We find no evidence whatever in the record to support these convictions. Just as 'conviction upon a charge not made would be sheer denial of due process' so is it a violation of due process to convict and punish the man without evidence of his guilt."
>
> 362 U.S. 199, at p. 206.

Again in *Garner v. State of Louisiana*, 368 U.S. 157 (1961), this Court held state criminal convictions to be so devoid of evidentiary support as to render them unconstitutional:

". . . We hold that the convictions in these cases are so totally devoid of evidentiary support as to render them unconstitutional under the due process clause of the Fourteenth Amendment. . . ."

368 U.S. 157, at p. 162.

See also *Houston v. Pierini*, 348 F.Supp. 6, 8 (N.D. Ohio 1972).

B. **As a corollary, a conviction is not Constitutional under the Due Process Clause of the Fourteenth Amendment unless there is proof beyond a reasonable doubt of every fact necessary to constitute the crime charged.**

In *In re Winship*, 397 U.S. 358 (1970), this Court stated:

"Lest there remain any doubt about *the constitutional stature* of the reasonable doubt standard, we explicitly hold that the due process clause protects the accused against conviction *except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.*"

397 U.S. 358, at p. 375 (Emphasis added).

Last year, in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), this Court reemphasized the importance of the reasonable doubt standard, as articulated in *Winship*, quoting from that decision as follows:

"In *Winship*, the court emphasized the societal interests in the reliability of jury verdicts:

'The requirement of proof beyond a reasonable doubt has [a] vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction . . .

Moreover, use of the reasonable doubt standard is indispensible to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.' 397 U.S. at 363, 364."

421 U.S. 684, at p. 699.

C. **Where, under state law, the prosecution is required to prove the sanity of the defendant, the defendant's sanity must, as a matter of Federal Constitutional law, be proven by the state beyond a reasonable doubt.**

In *Davis v. United States*, 160 U.S. 469 (1895), this Court reversed and remanded for new trial the conviction of the petitioner, charged with having committed murder "at the Creek Nation, in the Indian territory, within the western district of Arkansas". The Court discussed extensively the authorities, English and American, on the subject of the insanity defense and held that, once the initial presumption of sanity is overcome by the appearance of some evidence to the contrary, the burden is upon the prosecution to prove the defendant's sanity beyond a reasonable doubt, and that the accused is entitled to an acquittal unless the evidence excludes beyond a reasonable doubt the hypothesis of insanity. Although the Court was applying Federal criminal law, we submit that the Court's discussion of the basic questions of fairness involved is relevant in determining whether the Due Process Clause requires sanity to be proved beyond a reasonable doubt in states where the prosecution has the burden of proving sanity. The Court approached the matter at a very fundamental level:

". . . it is desirable that there be uniformity of rule in the administration of the criminal law in governments whose *Constitutions* equally recognize the *fundamental principles* that are deemed essential for the protection of life and liberty."

160 U.S. 469, at p. 488

(Emphasis added).

"No man should be deprived of his life under the forms of the law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged."

160 U.S. 469, at p. 493

"The principle is accurately stated by Mr. Justice Cox of the Supreme Court of the District of Columbia as follows: 'The crime, then, involves three elements, *viz.*, the killing, malice, *and a responsible mind in the murderer*. But after all the evidence is in, if the jury, while bearing in mind both these presumptions that I have mentioned—i.e. that the defendant is innocent until proven guilty, and that he is and was sane, unless evidence to the contrary appears,—and considering the whole evidence in the case, still entertain what is called a reasonable doubt, on any ground (either as to the killing or the responsible condition of the mind), . . . then the rule is that the defendant is entitled to the benefit of that doubt and to an acquittal.' *Guiteau's Case*, 10 Fed. Rep. 161, 163."

160 U.S. 469, at p. 492

(Emphasis added).

In *Leland v. Oregon*, 343 U.S. 790, (1952) this Court held, *inter alia*, that the states are not required by the Due Process Clause to place the burden of proving sanity upon the prosecution, (over the very strong dissent of Justice Frankfurter, joined by Justice Black). The *Leland* decision is not, however, inconsistent with the holding of *In re Winship* and other decisions that the Due Process Clause requires the proof beyond a reasonable doubt of every fact necessary to constitute the crime charged, including sanity in states where the burden of proving sanity is placed upon the prosecution. See in this connection *United States ex rel. Tate v. Powell*, 325 F.Supp. 333 (E.D. Penn. 1971).

The Sixth Circuit Court of Appeals recognized in *Phillips v. Neil*, 452 F.2d 337 (6th Cir., 1971) that the Due Process Clause requires, in states like Tennessee where the burden is upon the state to prove sanity, that sanity be proved beyond a reasonable doubt. In this case the Sixth Circuit held, upon other grounds, that a petition for a writ of habeas corpus challenging a Tennessee criminal conviction for first degree murder, where the petitioner pled insanity, must be granted,[2] and said, after quoting extensively from the decision of the Tennessee Supreme Court in *Davis v. State*, 161 Tenn. 23 (1930):

> "Applying this rule, Tennessee Courts have held that once a defense has made out a *prima facie* case of insanity in terms of the M'Naghten Rule the State must in order to overcome the defense offer evidence in rebuttal which demonstrates beyond a reasonable doubt the sanity of the defendant. *Dove v. State*, 50 Tenn. 348 . . .; *Stuart v. State*, 91 Tenn. 617, . . . See also *Jordan v. State*, 124 Tenn. 81, . . . and *United States v. Horne*, 304 F.2d 727 (D.C. 1969).

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[2] The Court directed entry of judgment granting the writ discharging the appellant from custody unless retried within a reasonable time.

"In *Garner v. Louisiana*, 368 U.S. 157, . . . the Supreme Court reversed criminal convictions for disturbing the peace when it found that:

'. . . the convictions in these cases are so totally devoid of evidentiary support as to render them unconstitutional under the due process clause of the Fourteenth Amendment. 368 U.S. at 163 . . .'

"See also *Thompson v. City of Louisville*, 362 U.S. 199, . . ."

452 F.2d 337, at p. 342

The Sixth Circuit Court of Appeals went on to say:

"It is our view after a careful review of the record that no evidence was introduced tending to cast substantial doubt on the prima facie case that the appellant was insane at the time of the slaying. *More certainly, there was no evidence introduced demonstrating the defendant's sanity beyond a reasonable doubt.* We choose not to rely on this ground however, since we hold that the admission of the three challenged reports constituted a violation of appellant's Sixth Amendment right to confrontation and cross-examination."

452 F.2d 337, at p. 342 (Emphasis added).

D. **In Tennessee it is clearly established that, although there is an initial presumption of the sanity of the defendant, once any evidence of insanity appears, the presumption ceases to exist and the burden is then upon the prosecution to prove beyond a reasonable doubt that the defendant is sane.**

This has been the law in Tennessee for over 100 years. See *Dove v. State*, 50 Tenn. 348 (1871); *King v. State*, 91 Tenn. 617 (1892), esp. pp. 647-8; *Richard v. State*, — Tenn. Cr. App. —, filed March 8, 1972;[3] *Butterworth v. State*, — Tenn. Cr. App. —, filed February 11, 1972;[3] *Covey v. State*, 504 S.W.2d 387 (1973), *cert. den.* (1973).

In *Richard, supra*, the Court unanimously reversed a rape conviction, and said:

". . . upon a careful weighing of the evidence, we are satisfied that the State has failed to carry the burden required of it to prove beyond a reasonable doubt the defendant's sanity at the time of the commission of the offense.

* * * * * * *

"For at least one hundred years the rule on this question in this State has been that to warrant a conviction, once the issue of insanity has been established, it must appear that the accused is capable, at the time of the crime, of distinguishing between good and evil, and had a consciousness of doing wrong. It is the duty of the State to prove all the essential elements on this issue beyond a reasonable doubt. (See *Dove v. State*, 50 Tenn. 348, p. 371)."

Richard v. State, supra, at pp. 8 & 9; Appendix K, p. A-133.

"In *King v. State*, 91 Tenn. 617, p. 648, citing *Dove v. State*, supra, the Court said:

'The presumption of sanity stands for sufficient proof of sanity until the presumption is overturned. When the proof of insanity makes an equipoise, the presumption of sanity is neutralized; it is overturned; it ceases to weigh, and the jury are in reasonable doubt.' "

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[3] Copies of the *Richard* opinion and the Opinion of the Court and the Concurring Opinion in the *Butterworth* case, which are unreported, are included in Appendix K and L, at pp. A-124-137 and A-138-149, respectively. The dissenting opinion in the *Butterworth* case was not included due to its length, but will be forwarded to the Court upon request.

Richard v. State, supra, at pp. 8 & 9; Appendix K, pp. A-132-134.

In *Butterworth, supra,* the Court also held that the prosecution had failed to sustain its burden of proving sanity beyond a reasonable doubt, emphasizing especially the state's failure to present expert medical testimony:

> "Applying the above rule to this case and the proof in the record before us we are struck by the fact that there was actually no proof offered in rebuttal of the three medical experts who testified that the defendant was insane at the time of the alleged crimes and thus corroborated the defendant's own testimony that when he saw his wife in bed with another man he was shocked to such an extent that everything seemed weird and unreal and that he was not conscious of the fact that he was shooting them until it was done.
>
> "No reason is suggested for the medical authorities to have deliberately testified falsely as to their observations and findings. No medical proof to the contrary was offered by the State."
>
> *Butterworth v. State,* Opinion of the Court, at p. 3; Appendix L, at pp. A-140-141.

The Court acknowledged that there was in the *Butterworth* case lay testimony in support of the defendant's sanity, but said:

> "Even if the accounts of the lay witnesses to the effect that the defendant exhibited a calm and unimpassioned manner before, during, and after the incident causing the death and wounding of the victims be considered as evidence suggesting sanity at the time of the commission of the crime as urged upon us by the State relying on the opinion of our Supreme Court in *Mullendore v. State,* 183 Tenn. 537, 194 S.W.2d 332, it is clear that in this case,

> unlike in *Mullendore,* the overwhelming weight of the evidence on the issue is to the effect that at the time of the shootings, Sergeant Butterworth was not possessed of that degree of rationality so as to meet the test of sanity."
>
> *Butterworth v. State,* Opinion of the Court, at p. 5; Appendix L, at p. A-142.

The *Butterworth* factual situation presented a much less compelling basis for the grant of a directed verdict, judgment notwithstanding the verdict, or new trial than does the *Edwards* case for a number of reasons, including the following:

1. Butterworth shot a man who was in bed with his wife and therefore the defendant had a strong and obvious motive for the killing. This was a classic case for reduction of the charge, but not for application of the insanity defense. Edwards, on the other hand, shot his younger sister and the evidence suggests absolutely no sane motive for the killing.

2. Butterworth had no history of psychiatric illness. Edwards was diagnosed as suffering from a serious psychosis months before the event, was under treatment at the time of the alleged crime, the physician who was treating Edwards prior to and at the time of the shooting himself testified that Edwards was legally insane at the time of the act, the only other physician who examined him soon enough after the act to reach a reliable conclusion unqualifiedly confirmed the treating physician's diagnosis, and the third physician employed by the State testified that the first two physicians were in a better position than himself or anyone else at Central State to reach a reliable conclusion with respect to the Petitioner's mental condition at the time of the act and with respect to it, and he confirmed that Edwards had the "ingredients" for a "psychotic break".

The meaning of the reasonable doubt standard as applied to the insanity defense is illuminated by a number of decisions

from jurisdictions other than Tennessee, including especially Federal criminal decisions. See for example *Issac v. United States*, 284 F.2d 168 (D.C. Cir. 1968); *Hartford v. United States*, 311 F.2d 204 (9th Cir., 1966), *cert. den.* 385 U.S. 883 (1966); *Buatte v. United States*, 330 F.2d 342 (9th Cir. 1964); *Frigilanna v. United States*, 307 F.2d 665 (D.C. Cir. 1962); *Beltran v. United States*, 302 F.2d 48 (1st Cir. 1962); *Phillips v. United States*, 311 F.2d 204 (10th Cir. 1962); *Pollard v. United States*, 282 F.2d 450 (6th Cir. 1960); *United States v. Westerhauser*, 283 F.2d 844 (7th Cir. 1960); *Blunt v. United States*, 244 F.2d 355 (1st Cir. 1962); *Douglas v. United States*, 239 F.2d 52 (D.C. Cir. 1956); *Britts v. State*, — Fla. —, 30 So.2d 363 (1947); *Farrel v. State*, — Fla. —, 101 So.2d 130 (1958); *Graham v. People*, — Colo. —, 38 P. 2d 87 (1934); *Handspike v. State*, — Ga. —, 45 S.E.2d 662 (1947); *Holmes v. State*, 20 Tex. App. 110 (1885); *People v. Skeoch*, — Ill. —, 96 N.E.2d 473 (1951).

In *Frigilanna*, the Court's opinion was written by Mr. Justice Burger, who was then sitting on the District of Columbia Court of Appeals. In his opinion, Justice Burger emphasized that the burden of proving beyond a reasonable doubt that the defendant is *not* insane is a very heavy one:

> "To prove the negative proposition beyond a reasonable doubt is in itself a *very heavy burden*."
>
> * * * * * * *
>
> "The *Davis* case [*Davis v. United States*, 160 U.S. 469] imposed on the prosecution the *very heavy burden* of proving beyond a reasonable doubt that the accused was mentally competent according to the applicable standards of criminal responsibility of the particular jurisdiction."
>
> 307 F.2d 664, at p. 667.
> (Emphasis added.)

The Trial Court, the Court of Appeals, and the Supreme Court in the instant case all acknowledged in a general way that the

presumption of sanity was overcome early in the state's proof, and that the state therefore had the burden of proving sanity beyond a reasonable doubt. See Trial Court's Charge to the Jury, T., pp. 764; 770-775; 775-780;[4] Court of Criminal Appeals Opinion, at pp. 2ff; Appendix B, p. A-8ff; Supreme Court Opinion at pp. 7ff, 10ff; Appendix C, pp. A-31ff, 33ff. None of the Courts below, however, focused clearly on this matter, and none of them properly enforced the reasonable doubt standard in this case. So far as we have been able to discover, the phrase "reasonable doubt" does not appear at any point in the Majority Opinions of either the Tennessee Supreme Court or the Court of Criminal Appeals. The test which the Supreme Court Majority says it applied in determining whether the state carried its burden is, rather, whether the evidence "preponderates against" the jury's verdict. See Supreme Court Majority Opinion, at p. 10, Appendix C, p. C A-34:

> "The jury's verdict indicates they found the state carried its burden of showing that petitioner was sane at the time of the homicide. In reviewing this finding to see if it comports with the evidence, we are bound by the rule that the verdict of the jury, approved by the trial judge accredits the testimony of the witnesses for the state and resolves all conflicts in favor of the theory of the state. *McBee v. State*, 213 Tenn. 15, 372 S.W.2d 173 (1963). We have read the record carefully keeping in mind the limits set forth in the *McBee* rule, and have concluded the evidence does not *preponderate against* the jury's finding that the petitioner, the moment he shot and killed his sister, knew what he was doing and knew right from wrong and that his acts were wrong."
>
> (Emphasis added.)

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[4] However, the inadequacy of the instructions on this matter is discussed in detail below, at pp. 63ff.

See also the Court of Criminal Appeals Majority Opinion at p. 3, Appendix B, p. A-9, which puts misplaced reliance upon the *McBee* rule in this connection.

E. **The state failed in the instant case, as a matter of law, to prove beyond a reasonable doubt that the Petitioner was sane at the time of the crime, and with respect to it.**

The only evidence introduced by the state in its attempt to sustain its burden of proof were:

(1) the opinions of lay persons, and

(2) the testimony of the supposed "expert", Mrs. Owensby. See T., pp. 622-651; Appendix M, pp. A-150-166.

The lay testimony did not provide an adequate basis for a jury finding that there was no reasonable doubt as to the Petitioner's sanity, because the lay witnesses were not adequately qualified and were not shown to have had adequate basis for their opinions, and because the instructions to the jury regarding this testimony were in error.

The supposedly "expert" testimony of Mrs. Owensby did not provide an adequate basis for a finding by the jury that the Petitioner was sane at the time of the crime and with respect to it, for the following reasons:

(a) Mrs. Owensby committed perjury and misrepresented her qualifications;

(b) Mrs. Owensby was not qualified to testify as an expert;

(c) Mrs. Owensby had no basis for providing and did not provide competent evidence as to the Petitioner's sanity at the time of the crime and with respect to the crime;

(d) That portion of Mrs. Owensby's testimony which discussed the meaning, effect, and consequences of a verdict of not guilty by reason of insanity, (which includes the most important part of her testimony), should have been excluded because of the Court's refusal to instruct the jury on this subject or to allow Petitioner's attorneys to discuss it.

(e) That portion of Mrs. Owensby's testimony which quoted or was based upon statements made to her by Petitioner, (which is substantially the same portion as referred to in (d)), should have been excluded for reasons which will be discussed.

(f) That portion of Mrs. Owensby's testimony which quoted or was based upon the statements and opinions of third persons regarding the mental condition of the Petitioner should have been excluded for reasons which will be discussed.

Let us now consider the above points in further detail:

1. *Lay Testimony*. The Courts below erred in allowing lay witnesses to express their opinions as to the ultimate issues in the case and in allowing them to express the opinions which they did express, because there was insufficient foundation laid to qualify these witnesses to express the opinions and to support the opinions expressed, and because the questions to these lay witnesses failed to accurately state the M'Naghten Rule. See T., 101, line 20; 102, line 5; 224, line 8; 225, line 10, 230, line 20; 231, line 6; 240, lines 18-24. The instructions to the jury with respect to expert witnesses were in error because the Court's instructions tended to encourage the jury to disregard the expert testimony and to give undue emphasis to the lay testimony. See T., 767. And the Court erred in failing to charge that the jury should review the opinions expressed by lay witnesses with respect to the ultimate issues in the case with at least the same degree of caution and skepticism with which the Court instructed the jury to view the testimony of the expert witnesses. See T., 767.

While it may be that none of these errors, standing alone, would raise Federal Constitutional questions, we submit that each must be given consideration in determining whether the state carried its burden of proving the Petitioner's sanity beyond a reasonable doubt, as required by the Due Process Clause.

As Judge O'Brien, of the Tennessee Court of Criminal Appeals said in his Dissenting Opinion in the instant case:

> "While expert testimony is to be received with great caution, *Mullendore v. State*, 183 Tenn. 53, 191 S.W.2d 149, as was correctly charged by the trial judge in this case, a nonexpert witness does not testify from the same standpoint as the expert, and it is for this very reason that he is required to give the facts upon which he bases his conclusions, so that the jury may say whether his conclusions are warranted by the facts, and the opinion of the nonexpert are only valuable and competent to the extent that they are supported by the facts and circumstances upon which they are predicated. *Wilcox v. State*, 94 Tenn. 106, p. 112, 28 S.W. 312. *Nowhere in this record was it developed that the lay witnesses who testified about defendant's mental competence were aware he was under psychiatric treatment for several months prior to the homicide. Nor were the particular facts coming under their observation, and on which their opinions were based, brought to the jury's attention in any fashion in order for the jury to determine whether their conclusions were warranted by the facts, as they applied to the time of the homicide.*"
>
> Judge O'Brien's Dissenting Opinion, at p. 9; Appendix B, pp. A-20-21. (Emphasis added).

One of the leading cases regarding lay testimony in insanity cases is *People v. Cole*, 382 Mich. 695, 172 N.W.2d 354 (1969). In this case the defendant had been convicted of second degree murder. The Supreme Court of Michigan re-

versed, holding that there was insufficient foundation for the testimony by the prosecution's witnesses, (all of whom were laymen), as to the defendant's sanity or insanity and that the admission of the testimony of such witnesses was reversible error.

The Court acknowledged that it is an almost universally accepted doctrine that the right to express an opinion as to sanity or insanity, where it is an issue, is not confined to experts. The Court said that it was equally well established that non-expert witnesses are not permitted to express general opinions as to sanity or insanity or to give opinions independent of the facts and circumstances within their own knowledge. (There are many Tennessee decisions so holding. See for example *Clark v. Wilbourn*, 7 Tenn. App. 46 (1927); *Atkins v. State*, 119 Tenn. 458 (1907); *Melody v. Hamblin*, 21 Tenn. App. 687 (1937); and *Hammond v. UP Bank*, 189 Tenn. 93 (1949).)

The Court went on to set forth the following guidelines:

> "Before a lay witness is permitted to state an opinion regarding the sanity or insanity or mental competency or incompetency of a person whose mental condition is at issue, the witness must have had ample opportunity to observe the speech, manner, habits, or conduct of the person. To render himself competent under this rule, the witness must establish he was sufficiently acquainted with the defendant or testator so as to testify to mental condition on a comparative basis and not merely to some manifested idiosyncrasy or eccentric behavior. The foundation to be laid in such a case must indicate that the conclusions of the witness bear directly upon the issue of insanity and not merely conclusions of fact as to defendant's conduct. * * *
>
> "The trial judge must also consider the character and nature of the alleged mental condition. In the area of criminal law we must be ever mindful of the fact that 'there

are cases of insanity open to the slightest scrutiny, while others defy the keenest search' * * * *Bearing this in mind, we urge that before admitting non-expert testimony on a matter as vital as the sanity of a defendant being tried for a capital offense, the trial judge's discretion should be exercised by resolving all doubts in favor of defendant.* * * *

"It must further appear that the witness took advantage of the opportunities to observe closely the person whose mental condition is at issue. The nature and number of extraordinary circumstances detailed must precede the giving of any opinion and the facts and circumstances so detailed must be such as tend to support the witness' conclusion. * * *

"Finally, there must be a proximity in point of time between the act involved and the facts and circumstances offered as a basis to render and support the non-expert's opinion. * * *

"We take great pains to point out and emphasize that the careful consideration of the factors detailed above and the ultimate decision reached by the trial judge goes to the admissibility of the lay witnesses' opinion and conclusion. * * *"

172 N.W.2d 354, at p. 361.
(Emphasis added).

The Court went on to analyze in detail the testimony of the lay witnesses. See 172 N.W.2d 354, at pp. 362-3. And the Court concluded that this testimony was "wholly inadequate to render any of the opinions of the lay witnesses as being competent under the law above stated" and that the "admission of these opinions was a manifest and palpable abuse of discretion", constituting reversible error. 172 N.W.2d 354, at p. 363.

As the Tennessee Supreme Court said in *State v. Holt*, 222 Tenn. 721, 440 S.W.2d 591 (1969), at 592, expert testimony

is almost indispensable in cases where the issue of sanity or insanity exists and a jury cannot be deemed competent to reach a satisfactory decision as to the question of mental condition without being instructed by experts as to the manifestation of mental derangement and disease and the significance of the symptoms in evidence. See also *Union Traction Co. v. Anderson*, 146 Tenn. 476 (1921), at 495, and *Fisher v. Insurance Co.*, 124 Tenn. 450 (1911).

It should also be noted that, as discussed above, in *Butterworth v. State*, — Tenn.Crim.App. —, filed February 11, 1972 (unreported opinions set forth in Appendix L, pp. A-138-149.) The conviction was reversed on the ground that the state had failed to prove the defendant's sanity beyond a reasonable doubt, notwithstanding the fact that the state presented some lay testimony indicating or suggesting sanity. See *Butterworth*, Opinion of the Court, pp. 2ff; Appendix L, pp. A-139-143.

In a recent decision reversing a federal obscenity conviction after a jury trial in which the prosecution offered no expert testimony, the United States Court of Appeals for the First Circuit held such expert testimony to be essential to "fundamental fairness" and "due process":

"Although it seems unfortunate to change the ground rules after a trial as well run as this one, we have come to the point where, so long as the tests for obscenity remain the present sophisticated trilogy, we think *fundamental fairness*, and therefore *due process, requires* the intervention of *experts*. If we are mistaken in that conclusion, we have such doubts about our own unassisted ability to give obscenity cases informed judicial review, that we reach the same result through our supervisory power.

"In saying this we are under no illusion that 'experts' will render the process of adjudicating obscenity a completely rational one, at either trial or on appellate review.

* * * Nevertheless, we think that the several applicable tests can have a fair chance of being fairly applied only if jurors and judges are exposed to opinion and made to think about whether the 'dominant' theme is an appeal to 'prurient interest' . . . etc.] Such matters as prurience, deviant attitudes, national standards of acceptability, and redeeming social values are far removed from the thought and experience of the average jury. Jurors, it seems to us, need assistance in wrestling with such issues fully *as much as they need assistance in evaluating insanity or other mental or emotional illness defense.* * * *

* * * * * * * *

"If we are to present *uneven and hence unequal application of the same federal law,* we must have experts to advise the jury, and the no less limited appellate judges, as to contemporary national standards."

U. S. v. Palladino, 475 F.2d 65 (1st Cir., 1973); *judgment vacated,* 413 U.S. 916 (1973). (Emphasis added).

We submit that the considerations to which the First Circuit Court of Appeals adverts in the above decision are equally applicable in the instant case. Surely if the conviction of a defendant charged with violation of the federal obscenity laws Constitutionally requires expert testimony, the conviction of a defendant raising the insanity defense in a murder case requires expert testimony of sanity.

We believe the Court's reference to the necessity of expert testimony "to prevent uneven and hence unequal application of the same federal law" to be especially significant. See in this connection the recent decision of this Court in the capital punishment cases, *Furman v. Georgia,* et al., 408 U.S. 238 (1972).

In the instant case, the instructions to the jury with respect to its consideration of expert testimony were as follows:

"The jurors are the sole judges of the facts. Expert witnesses have been allowed to testify as to certain matters of issue in this case and to state their opinions. With reference to this testimony, which you should consider and judge along with all the other proof, the Court charges you that it should be received with caution. While this kind of testimony is sometimes the only means or the best way to reach the truth, yet it is largely a field of speculation, beset with pitfalls and uncertainties, and requires patience and intelligent consideration to reach the truth. You should give it the same consideration as all the other proof, governed by the same rules to arrive at the truth as you are governed by in your consideration of all the proof." T., 767-768

These instructions were erroneous and prejudiced the rights of the Petitioner because the sole issues in the case were issues requiring the testimony of experts and the full consideration thereof by the jury, and the instructions encouraged the jury to disregard such testimony, and to base its verdict upon uninformed lay testimony. The jury should in any event have been instructed to view the opinions expressed by the lay witnesses with respect to the ultimate issues in the case with at least the same degree of caution and skepticism with which the Court instructed the jury to view the testimony of the expert witnesses.

The science of psychiatry, although well established, recognized by all, and given full recognition and support by the laws of the State of Tennessee, has been the target of much irrational suspicion and prejudice in our society, and it is for this reason especially important that—in cases where the very lives and liberty of defendants depend upon the fair and just consideration and the accurate determination of psychiatric issues —the jurors be given instructions which will insure that psychiatric evidence will be given fair hearing and consideration. We

believe that the instant case provides a striking illustration of the strength of this prejudice—and that this provides the only rational explanation for the jury's apparent disregard of the testimony of the expert witnesses offered on behalf of the Petitioner.

We submit that it is time that the courts acknowledge in their instructions to criminal juries what all educated men in this society know, and what the legislature of this State has repeatedly recognized—that determinations with respect to mental derangement and disease, their manifestations and symptoms, and the interpretation thereof, are determinations which cannot be rationally made unless informed by the knowledge of experts.

2. **The Owensby Testimony.** As Justice Henry stated in his Dissenting Opinion in the Tennessee Supreme Court, the state's case against Petitioner "in the last analysis, must stand or fall on the testimony of Nona Owensby." Justice Henry's Dissenting Opinion (Justice Fones Concurring), at p. 17; Appendix C, p. A-54. Her testimony was allowed to be given special emphasis with the jury because the Trial Court, over the Petitioner's strenuous objections, allowed the State to deliberately withhold her testimony until after the Petitioner's proof, and to present her testimony to the jury at the end of the trial. Even if Mrs. Owensby's testimony were accepted in full, the testimony (which is set forth in full in Appendix M, pp. M A-150-166) would not provide an adequate basis for a finding that there is no reasonable doubt as to the Petitioner's sanity. Most or all of her testimony must be disregarded, however, upon a variety of grounds, including the six enumerated above, which we will now discuss in more detail.

(a) **Owensby's Perjury—Misrepresentation of Qualifications.**

As Justice Henry noted in his Dissenting Opinion, "After giving her name, the first words she uttered [identifying herself as a psychologist in the Forensic Services Division at Central State Hospital] were false." Justice Henry's Dissenting Opinion, at p. 13; Appendix C, p. A-50. As was indicated in the Statement of the Case, *supra*, the Petitioner and his attorneys had no way of knowing that Mrs. Owensby had committed this perjury, and did not know it, until after the decision of the Court of Criminal Appeals was rendered in this case. At that time, there appeared in the newspapers articles regarding the rather sensational testimony of Mrs. Owensby and others during hearings before a Special Committee named by the State Department of Mental Health Commissioner to investigate charges of misconduct on the part of Mrs. Owensby and other employees at Central State Hospital. See Statement of the Case, *supra*, at pp. 14ff, and Appendix H, at pp. A-102-116. As has been stated, the Special Committee specifically found as follows regarding Mrs. Owensby's conduct:

1. "That she exceeded her authority in testifying before the Courts on matters of . . . insanity."

2. "That she flagrantly exceeded the authority of her license as a psychological examiner."

3. "That she failed or refused to pursue clarification of the extent of her licensed authority when this was brought to her attention, and continued her activities."

4. "That she furnished courts, defense attorneys, and District Attorneys with 'Qualifications as an Expert Witness' containing information that was inaccurate and misleading, implying professional education in capabilities exceeding those actually possessed."

5. "That she considered herself competent to counsel, evaluate and perform all duties without supervision and did so."

6. "That she held herself out to be a psychologist by using her working title as an indication of professional qualifications, tending to mislead Courts before [whom] she gave testimony."

The Tennessee Advocate General, as has been set forth in the Statement of Facts, advised the State Supreme Court concerning Mrs. Owensby's misrepresentation of her qualifications and agreed that the material filed by Petitioner regarding this matter, although *de hors* the record, should be considered by the Court. See Statement of the Case, p. 16, Appendix J, pp. A-119-120. Unaccountably, the majority opinion of the Tennessee Supreme Court refused to consider this matter.

This perjury by the State's only supposedly "expert" witness, who the State admits deliberately misinformed the jury and Court as to her qualifications, absolutely requires the grant of this Petition and the reversal of this conviction, in our view. Surely, in view of the misrepresentation of the qualifications of this most crucial witness, it cannot be found that the Petitioner has received due process and a fair trial.

(b) and (c) **Owensby Not Qualified as Expert—No Basis for Testimony.**

Independently of the prejudicial effect of her misrepresentation of her qualifications, Mrs. Owensby was not qualified to testify as an expert in this case and in any event was in no position to testify as to the Petitioner's sanity at the time of and with respect to the crime. She was not a psychologist. She was not a doctor and did not have sufficient medical qualifications to allow her to prescribe medication. T., 593-4, 623,

632-3. She had never seen the Petitioner until long after the murder, when he was sent to Central State Hospital for an evaluation of his mental capacity to stand trial. T., 625. Dr. Jacob Fidelholtz, head of the Forensic Services Division at Central State Hospital, and Mrs. Owensby's superior testified that neither he nor any member of his staff (of which Mrs. Owensby was a member) had formed or expressed any opinion as to the Petitioner's sanity at the time of the murder. T., Vol. VIII, Ex. 18 (Transcript of Hearing of November 2, 1972, pp. 8-9), and T., 665-667, 669-670. He also testified that Drs. Walker and Aivazian, who had examined the Petitioner at the time of the crime and who testified in the most conclusive terms that the Petitioner was insane at the time of the murder, were in a better position than he (or anyone at Central State) to reach an opinion as to Petitioner's mental condition at that time. *Ibid.* Mrs. Owensby testified that she made no notes of any interviews with the Petitioner and did not give the dates of any such interviews. She admitted, and the record clearly shows, that at the time when she examined the Petitioner, he was under the influence of a "major tranquilizer", thorazine, which was capable of masking some of Petitioner's symptoms of insanity. T., 633; Appendix M, p. A-156. She was under the impression that the psychiatrists who had testified in this case had diagnosed the Petitioner's disorder as manic-depression, which was completely erroneous. T., 637, Appendix M, p. A-159. *See, generally,* Justice Henry's Dissenting Opinion, at pp. 12-17; Appendix C, pp. A-49-55.

(d) **Owensby Testimony re meaning, effect, and consequences of insanity verdict.**

It is important to recognize the extent to which Mrs. Owensby in her testimony dwelt upon the meaning, effect, and consequences of a verdict of not guilty by reason of insanity. See T., pp. 625-628; Appendix M, pp. A-151-154. As we will discuss in

detail below, it is our contention that the Court should have instructed the jury as to the meaning, effect, and consequences of such a verdict. See pp. 73ff, *infra*. However, it is in any event clear that having refused to explain this matter to the jury in its charge, or to allow the Petitioner's attorneys to make any reference thereto in *voir dire* or argument, the Court should have excluded any discussion of this subject by Mrs. Owensby (and should also, as is discussed *infra*, at pp. 73ff, have prohibited any discussion thereof by the State's attorneys in their argument).

As a review of Mrs. Owensby's testimony will confirm, her principal reason for concluding that the Petitioner was not in fact insane at the time of the crime and with respect to it was the alleged fact that the Petitioner, in his interviews with her, discussed his belief that he would go free if found insane at the time of the crime but presently sane. See T., pp. 625-628; Appendix M, pp. A-151-154. This testimony obviously made a great impression upon the jurors, and may well be the best explanation for their surprising verdict. Certainly, under the circumstances, it left them with the vivid impression that the Petitioner would indeed go free upon such a verdict—an impression which was underlined and reemphasized by the argument of the State's attorney.

(e) **Owensby's Testimony re Petitioner's Admissions.**

There is a second, and wholly independent, reason why the portion of Mrs. Owensby's testimony, discussed immediately above under (d), should have been excluded—namely, because the admission of her testimony concerning such statements by Petitioner violated his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

At the time when Petitioner made these statements he had been indicted and was in custody, in an authoritarian, coercive

environment, he was under the influence of strong drugs, administered by agents of the state, he was not advised of his rights, or given the warnings to which he is entitled under the Constitution, and he could not be held to have intelligently and voluntarily waived his rights. He had been transferred to Central State Hospital solely for evaluation of his competency to stand trial. Petitioner did not directly or indirectly consent to an examination of his sanity at the time of the crime or with respect to it, or waive any of his Federal Constitutional rights relating thereto.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court emphasized that the modern practice of in-custody interrogation is psychologically rather than physically oriented:

> "Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, 'since *Chambers v. Florida*, 309 U.S. 227 . . . this Court has recognized that coercion can be mental as well as physical and that the blood of the accused is not the only hallmark of an unconstitutional inquisition'. *Blackburn v. Alabama*, 361 U.S. 191 . . ."
>
> 384 U.S. 436, at p. 448.

The Court also stressed that the Fifth Amendment privilege is available outside Criminal Court proceedings:

> "Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of Criminal Court proceedings and serves to protect persons *in all settings in which their freedom of action is curtailed* from being compelled to incriminate themselves."
>
> 384 U.S. 436, at p. 467. (Emphasis added.)

The logic of *Miranda* is clearly applicable to the case at bar.

In addition to *Miranda*, there is a well established independent requirement that a confession of a person accused of crime can be admitted into evidence only if it was freely and voluntarily made, with full knowledge of the nature and consequences of the confession. See, for example, the decisions cited in 29 Am.Jur.2d, Evidence, § 529, especially footnotes 15-16. As this Court has stated in *Jackson v. Zerbst*, 304 U.S. 458 (1938), a voluntary waiver of the protections afforded by the Constitution is "an intentional relinquishment or abandonment of a known right or privilege." And as this Court has reiterated recently in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), at pp. 238, 239.

> "The guarantees afforded a criminal defendant at trial also protect him at certain stages before the actual trial, and any alleged waiver must meet the strict standard of an intentional relinquishment of a 'known' right . . . [T]he 'trial' guarantees that have been applied to the 'pre-trial' stage of the criminal process are similarly designed to protect the fairness of the trial itself."

Petitioner's statements to Mrs. Owensby, if not confessions, were in any event admissions against interest, which are subject to the same Constitutional requirements concerning waiver as are confessions. See *Opper v. United States*, 348 U.S. 84 (1954). In the *Miranda* decision itself, this Court held that no distinction could be drawn between statements which were direct confessions, and statements which amounted to admission of part or all of an offense, nor between inculpatory statements and statements alleged to be merely exculpatory. See 384 U.S. 436 (1966), at pp. 476-477. And *Escobedo v. Illinois*, 378 U.S. 478 (1964), held inadmissible incriminating statements which amounted to something less than a confession.

We have found very few decisions dealing with the admissibility of testimony by psychiatrists and psychologists employed

at state mental hospitals setting forth admissions or confessions by criminal defendants committed for determinations of capacity to stand trial. See, however, *South Carolina v. Myers*, 220 S.C. 309, 67 SE2d 506 (1951), in which, while an indictment for murder was pending against the appellant, his counsel obtained an order from the Court allowing him to be taken to the Veterans Hospital at Columbia, South Carolina, for a series of tests and examinations to determine his mental condition. Thereafter, on motion of the state and over objection of counsel for the appellant, the Court issued an order committing him to the State Hospital for Insane at Columbia for a period of thirty days, for the purpose of having the authorities of that institution make an examination as to his sanity. This order was appealed. On appeal the appellant contended that the action of the Court in compelling him to undergo such examination (1) violated his Constitutional rights in that it compelled him to be a witness against himself and (2) constituted a denial of the Constitutional guarantee of due process of law. Although the South Carolina Supreme Court rejected these contentions, the Court stated:

> "We do not undertake now to define the limits of such rights except to say that the authorities of that institution will not be permitted, over the protest of the accused, to reveal any confession made by him in the course of such examination, or any declarations implicating him in the crime charged."
>
> 67 SE2d 506, at p. 508.

See also *State ex rel. LaFollet v. Raskin*, 34 Wisc. 2d 607, 150 N.W. 2d 318 (1967), to the effect that where it appears that any incriminating statements have been made by an accused during a compulsory mental examination, he should have his privilege against self-incrimination recognized and protected at the trial by a sequential order of proof so that such evidence will not be admitted while the jury is determining the issue of guilt.

Petitioner's confinement and questioning by an agent of the State without being afforded the presence of counsel also violated his rights under the Sixth Amendment.

In *U. S. v. Wade*, 388 U.S. 218 (1966), this Court held that the Sixth Amendment mandates the presence of counsel at critical stages of the prosecution to preserve the right to a fair trial. A "critical stage" was defined by this court as:

> "Any stage of the prosecution, formal or informal, in court or out, where . . . the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself."
>
> 388 U.S. 218, at pp. 226-227.

Since pretrial psychiatric examinations are a critical stage in the prosecution of one accused of a crime, Petitioner is entitled to have counsel present to make more effective his basic right of cross-examination.

This Court has apparently not rendered a definitive decision regarding compliance with the Sixth Amendment requirements in such a court ordered pretrial psychiatric examination. However, a number of lower courts have held the Sixth Amendment guarantees of right to counsel applicable in such a setting.

In *Lee v. County Court of Erie County*, 267 N.E.2d 452 (1971), the Court of Appeals of New York held that a psychiatric examination constituted a critical stage of the criminal proceedings. It therefore reversed a lower court order prohibiting the presence of defense counsel at the psychiatric examination. Two judges dissented from the majority opinion's requirement that defense counsel be allowed only to attend as observers, and stated that the defendant's right of counsel during a pretrial mental examination should not be limited. As stated by Chief Judge Fuld, dissenting:

> "I think it's self evident that to restrict a defendant's right to a lawyer upon his pretrial mental examination—at least when he is being questioned for the purpose of determining his mental condition at the time of the crime —will frequently have the effect of substantially abridging, if not eliminating, every right he may have to the effective assistance of counsel in the preparation of his defense."
>
> 267 N.E.2d 452, at p. 460.

The dissenting opinion of Judge Breitel also dealt with the consequences of limited representation at such an examination.

> ". . . The line between an inquiry limited to [a defendant's] mental condition and one extended to the merits of the charge against the defendant cannot be drawn. Several consequences follow from this. In the first place, it marks as especially critical to defendant his exposure to oral interrogatory examination, and, therefore, emphasizes the critical need for him to be represented by counsel even during a mental examination, clumsy and awkward although that might be . . . ."
>
> 267 N.E.2d 452, at p. 461.

See also the Note, "Pretrial Mental Examination and Commitment; Some Procedural Problems in the District of Columbia," 51 Geo. L.J. 143 (1962), at 162:

> "The dangers inherent in subjecting the defendant to [such an examination] without giving him the benefit of an attorney's advice are obvious. The . . . often uneducated defendant will seldom understand the far-reaching significance of the questions put to him by a trained psychiatrist. Questions calling for seemingly innocuous answers can be aimed at eliciting the most damaging responses. Without the benefit of counsel to advise him, it is quite likely that the accused will unknowingly provide the prose-

cution with sufficient evidence to secure his conviction by defeating his defense of insanity before the trial has even begun. In such a situation the harm done to the defendant's case is irreparable. When the sole issue is the defendant's sanity at the time of the crime, the right to the assistance of counsel is thus as important at the time of the defendant's mental examination as it is at the time of the trial itself."

(f) **Owensby testimony re statements and opinions of third persons.**

The rights of confrontation and cross-examination are essential componets of a fair trial and due process. See *Pointer v. Texas,* 380 U.S. 400 (1965):

"There are few subjects, perhaps, upon which this court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law."

380 U.S. 400, at 405.

See also *Dutton v. Evans,* 400 U.S. 74 (1970):

"The decisions of this court make it clear that the mission of the confrontation clause is to advance a practical concern for the accuracy of the truth determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement'. *California v. Green,* 399 U.S., at 161."

400 U.S. 74, at p. 79.

Mrs. Owensby's testimony was based in substantial part upon information received from third persons—especially information contained in the Petitioner's medical records. See T., 606-621;[5] 625-630; 630-640; Appendix M, pp. A-151-155, 155-161. As she stated in answering a question posed by the trial judge:

". . . However, your Honor, I think, you know, all of the information we gather from all sources has a bearing on the opinions that I found . . ."

T., p. 610.[5]

Later at trial, Mrs. Owensby testified concerning a diagnosis of an unknown third party that the Petitioner was a "manic-depressive" when in fact, such was not the case.

"Q. (Counsel for Petitioner): Madam, while you have [your records] open there, if you will call my attention to the point where you say there was a diagnosis of manic-depressive, well, call it to the attention of the court and jury and to me, please, ma'am?

"A. Well, I don't see it here.

"Q. It is not there, is it?

"A. No, but the word came to me and I cannot tell you how.

"Q. The word came to you?

"A. Uh-huh, that's right."

T., 638-39; Appendix M, p. A-160.

We would call the Court's attention in this connection to the following decisions: *Covey v. State,* 504 S.W.2d 387 (1973), *cert. den.* 1973; *Phillips v. Neil,* 452 F.2d 337 (6th Cir. 1971);

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[5] This portion of the testimony of Mrs. Owensby, which occurred outside the presence of the jury, is not included in the Appendix.

Ingles v. People, 90 Colo. 51, 6 P.2d 455 (1931); *New York Life Insurance Company v. Taylor*, 147 F.2d 297 (D.C. Cir. 1945); and *Ohio v. Tims*, 9 Ohio St. 2d 136, 224 N.E.2d 348 (1967).

In *Covey, supra*, the defendant was convicted of murder in the first degree of his mother. The only expert witness in the case was Mrs. Nona Owensby, the same Nona Owensby testifying on behalf of the State in the instant case. Mrs. Owensby was permitted to testify over defense objections, (as a witness for the State *in rebuttal*, incidentally), that in her opinion the defendant was sane at the time of the crime and that it was the opinion of the hospital staff that defendant was sane when examined and evaluated over this period of time. 504 S.W.2d 387, at 389. The Court of Criminal Appeals reversed and remanded the case based on a number of errors committed at trial, emphasizing that it was error for the trial court to permit Mrs. Owensby to testify as to what other alleged experts had said, and that it was error to admit the report of such experts without establishing their qualifications. The Court said in this connection:

> "Hearsay testimony was admitted over objection to the effect that the medical staff at Central State Hospital had certified that the defendant was presently sane and competent to advise counsel in his defense. Although the trial court was satisfied with the qualifications of the witness, Mrs. Owensby, and allowed her expert opinion testimony on the issue of insanity at the time of the crime based on her personal observations and evaluations of tests, there was no foundation laid for the qualification of other staff members. The state urges admissibility of such testimony and certificate under the Business Records Act, . . . Finding error in the admission of the report of a physician whose qualifications had not been proved and who was not available for cross-examination, the [Tennessee] Supreme Court quite recently said:

> 'Defendant insists it was error for the trial judge to admit into evidence the autopsy report. We agree.'
>
> "Hearsay evidence, as previously defined is evidence which derives its value not solely from the credit to be given the witness upon the stand, but in part from the veracity and competency of some other person. The clearest case of hearsay is where a witness testifies to the declaration of another for the purpose of proving the facts asserted by the declarant." 20 Am.Jur., Evidence, Section 458; *Schlickling v. Georgia Conference Association*, 49 Tenn. App. 412, 355 S.W.2d 469 (1961).
>
> "In the case of *Tevis v. Proctor and Gamble Distributing Company*, 21 Tenn. App. 494, 113 S.W.2d 64 (1937), a physician undertook to testify to what another physician said with respect to his diagnosis of plaintiff and also from a written report of another physician. The trial judge excluded the evidence. The Court of Appeals affirmed the action of the trial judge, saying:
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> * * * * * * * *
>
> *"The admission of the report gave petitioner the benefit of an opinion of Dr. Moss whose qualifications are not shown and deprived defendant of the right of cross-examination.*
>
> * * * * * * * *
>
> "Nor do we think the report was admissible under the Uniform Business Records as Evidence Act, . . ."
>
> * * * * * * * *
>
> *Neas v. Snapp*, 221 Tenn. 325, 426 S.W.2d 498.
>
> "[12] Thus it was error for the Court to permit Mrs. Owensby to testify as to what other alleged experts had said, and it was error to admit the report of such experts without establishing their qualifications."
>
> 504 S.W.2d 387, at 391, 392. (Emphasis added.)

Phillips v. Neil, supra, is a 1971 decision of the U. S. Court of Appeals for the Sixth Circuit upon a petition for writ of habeas corpus challenging the Tennessee criminal conviction of Phillips for first degree murder, Phillips having raised the insanity defense. Phillips' motions for directed verdict and for new trial were denied. He then exhausted his state appellate remedies. The Federal District Court denied his petition for habeas corpus. The Court of Appeals for the Sixth Circuit reversed and remanded with direction for entry of judgment granting the writ discharging the appellant from custody unless retried within a reasonable time.

The appeal was based on two contentions, one of which was that due process was denied when the trial court did not sustain the defendant's objections to the prosecutor's reading of certain portions of his medical record in rebuttal to the insanity defense, these portions consisting of the reports of mental examinations made approximately one year prior to the alleged offense and containing, among other statements prejudicial to the defendant, the conclusion that the defendant had returned to Eastern State to avoid certain criminal charges.

At trial, the first witness to testify regarding the mental condition of the appellant was Dr. Manuel Cortinas, a psychiatrist at Eastern State Hospital at the time of the events in question. Dr. Cortinas testified as to statements made by Phillips at this interview which amounted to a confession to the offense. During direct examination of Dr. Cortinas by the prosecution, a copy of the appellant's medical record at Eastern State was filed in evidence. The defense counsel acquiesced in the filing of a copy of the medical record rather than the original. No question was raised at this point regarding the admissibility of the record or any part of it either under Tennessee Rules of evidence or Federal Constitutional standards. See 452 F.2d 337, at 338-9. At the conclusion of the appellant's proof, the state offered rebuttal evidence which consisted solely of the reading of certain

portions of the appellant's lengthy medical record compiled at Eastern State. The portions of the record which were read were reports of mental examinations made almost one year prior to the events in question. The defense objected to this, and these objections were overruled.

The Court of Appeals said that the statements made in the challenged reports were the only evidence before the jury which suggested that the appellant might be responsible for his actions. The Court said that since the guilty verdict represented a rejection of the insanity defense, "It seems apparent that the jury relied on these reports and therefore that their introduction was highly prejudicial to the appellant". 452 F.2d 337, at 341. The Sixth Circuit Court quoted extensively from the decision of the Tennessee Supreme Court in *Davis v. State,* 161 Tenn. 23 (1930) and said:

> "Applying this rule, Tennessee Courts have held that once a defense has made out a prima facie case of insanity in terms of the M'Naghten Rule the State must in order to overcome the defense offer evidence in rebuttal which demonstrates beyond a reasonable doubt the sanity of the defendant. *Dove v. State,* 50 Tenn. 348, . . .; *Stuart v. State,* 60 Tenn. 378, . . .; and *King v. State,* 91 Tenn. 617, . . . See also *Jordan v. State,* 124 Tenn. 81, . . . and *United States v. Horne,* 304 F.2d 727 (D.C. 1969).
>
> "In *Garner v. Louisiana,* 368 U.S. 157, . . . the Supreme Court reversed criminal convictions for disturbing the peace when it found out that:
>
> '. . . the convictions in these cases are so totally devoid of evidentiary support as to render them unconstitutional under the due process clause of the Fourteenth Amendment. 368 U.S. at 163 . . .'
>
> "See also *Thompson v. City of Louisville,* 362 U.S. 199, . . ."
>
> 452 F.2d 337, at 342.

The Sixth Circuit Court of Appeals went on to say:

> "It is our view after a careful review of the record that no evidence was introduced tending to cast substantial doubt on the prima facie case that the appellant was insane at the time of the slaying. *More certainly, there was no evidence introduced demonstrating the defendant's sanity beyond a reasonable doubt. We choose not to rely on this ground however, since we hold that the admission of the three challenged reports constituted a violation of appellant's Sixth Amendment right to confrontation and cross-examination.*
>
> "In *Pointer v. Texas*, 380 U.S. 400, . . . the Supreme Court held that 'the Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment.' Emphasizing the importance of cross-examination and the fair adjudication of criminal matters the Court stated:
>
> > 'It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. 380 U.S. at 404, 85 S.Ct. at 1068.'
>
> "The Court has made clear the importance of this right in our scheme of criminal justice on a number of occasions. For example, in *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed. 2d 1377 (1964), the Supreme Court said of rights of confrontation and cross-examination:
>
> > 'They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. 360 U.S. at 496-497, 79 S.Ct. at 1413.'

> "And again in *Pointer*, it was said:
>
> > 'There are few subjects, perhaps, upon which this Court and other *courts have been* more nearly *unanimous* than in their expressions of belief that *the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.* Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him *is a denial of the Fourteenth Amendment's guarantee of due process of law.* 380 U.S. at 405, 85 S.Ct. at 1068.'
>
> "Especially pertinent is *Smith v. Illinois*, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed. 2d 956 (1967), where the accused's Sixth Amendment rights were held to have been abridged when the trial court sustained the prosecutor's objections to disclosure on cross-examination of the correct name and address of the key witness for the prosecution. The Court stated:
>
> > 'In the present case there was not, to be sure, a complete denial of all right of cross-examination. But the petitioner was denied the right to ask the principal prosecution witness either his name or where he lived, although the witness admitted that the name he had first given was false. Yet when the credibility of a witness is in issue, the very starting point in "exposing falsehood and bringing out the trust" through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examina-

tion and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself. 390 U.S. at 131, 88 S.Ct. 748, 750, 19 L.Ed. 2d 956.' "

452 F.2d 337, at pp. 342-3 (Emphasis added).

The Court rejected the contention that the challenged evidence was properly admitted under the statutory exception to the hearsay rule embodied in TCA Section 24-714, saying that even if the proffered evidence was a business or hospital record within the meaning of that statute it was nevertheless not admissible. The Court said:

"The relationship bewteen the Sixth Amendment right to confrontation and cross-examination and the hearsay rule and its exceptions has not been fully explored. Some time ago Professor Wigmore asserted an identity between the two, stating, seemingly without qualification:

'The rule sanctioned by the constitution is the Hearsay rule as to cross-examination, with all the exceptions that may be legitimately found, developed, or created therein. 5 Wigmore on Evidence, Section 1397, p. 131.

"In two recent cases, *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed. 2d 213 (1970) and *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed. 2d 489 (1969), the Supreme Court, while refusing to set forth a theory that would determine the validity of all such hearsay 'exceptions' (399 U.S. at 162, 90 S.Ct. at 1937), provided guidance regarding proper application of the Confrontation Clause. In both cases the Court expressly rejected the notion of congruency. In *Dutton v. Evans, supra*, Mr. Justice Stewart stated:

'It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule

stem from the same roots. But this Court has never equated the two, and we decline to do so now. 400 U.S. at 86, 91 S.Ct. at 218.'

And in *California v. Green, supra*, Mr. Justice White stated:

'While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. See *Barber v. Page*, 390 U.S. 719 [88 S.Ct. 1318, 20 L.Ed.2d 255] (1968); *Pointer v. Texas*, 380 U.S. 400 [85 S.Ct. 1065, 13 L.Ed.2d 923] (1965). The converse is equally true; merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied. 399 U.S. 155, 156, 90 S.Ct. 1933.' "

The Court concluded:

"Thus, it is abundantly clear that proper admission of evidence under an exception to the hearsay rule does not relieve a federal court considering a state criminal conviction from the responsibility for reviewing all the facts of the case in light of governing federal constitutional principles. *Furthermore, fundamental constitutional rights may find protection both in procedural safeguards and in substantive rules. Standards of due process are not necessarily embodied in state evidentiary rules.* For example, as we shall see below, while the colloquy which took place when

the medical records were filed as Exhibit 3 might arguably have constituted a waiver of a hearsay objection under Tennessee law, it *in no way constitutes a valid waiver of a 'fundamental right'* guaranteed in both state and federal criminal prosecutions. *Thus, that the reports may have been validly admitted under Tennessee rules of evidence does not dispose of the question whether their admission constituted a violation of the appellant's Sixth Amendment rights.*"

452 F.2d 337, at p. 345.
(Emphasis added)

Turning to the question of waiver, the Court said that the State and the Courts below had made the agreement of the defendant's trial counsel to the filing of the medical records the focus of their analysis of the case. The Court said:

"We find that trial counsel's acquiescence did not constitute a valid waiver of the appellant's *fundamental constitutional right* to confrontation with regard to the crucial evidence here in question."

452 F.2d 337 at pp. 348-9.
(Emphasis added.)

The Court went on to discuss *Brookhart v. Janis*, 348 U.S. 1 (1966), and other cases dealing with the waiver of Constitutional rights and held that it was clear that the appellant Phillips had not intentionally, intelligently, and knowingly waived his Sixth Amendment right to confrontation.

In *Ingles v. People*, 90 Colo. 51, 6 P.2d 455 (1931), the defendant had pled not guilty by reason of insanity to a charge of first degree murder. Pursuant to the plea, he was committed to the Colorado Psychopathic Hospital for psychiatric observation. At the trial the Assistant Director of the hospital, testifying for the prosecution, described the manner in which in-

formation was obtained to aid in ascertaining whether or not the defendant was insane. He also testified that in his opinion the defendant was sane though his intellectual capabilities were retarded. The Colorado Supreme Court reversed the conviction, stating:

"[*A psychiatrist*] *cannot express an opinion based in whole or in part upon information obtained from third persons who have not testified to the facts.* A defendant is entitled to test the reliability of such statements made by a third person, by having that statement made under oath, and by cross-examining the person making them and exhibiting the situation of the witness with respect to the defendant . . ."

6 P. 2d 455, at p. 459.
(Emphasis added.)

According to the article, "The Admissibility of Expert Medical Testimony Based in Part Upon Information Received from Third Persons", 357 Cal. L. Rev. 193 (1962), at p. 205:

". . . the majority of courts presently exclude the opinion of a *psychologist or psychiatrist* who bases his opinion, *in part*, upon information received from third persons. * * *"

(Emphasis added.)

This is true even in civil cases. For example, in *New York Life Insurance Company v. Taylor*, 127 F. 2d 297 (D.C. Cir., 1945), which involved a claim for life insurance policy for a double indemnity for accidental death where the defense was that the insured had committed suicide, the United States Court of Appeals held in a powerful majority opinion by Judge Arnold that the trial judge had properly excluded, under the Federal Business Records Act, hospital records showing a diagnostic report by psychiatrists of "psychoneurosis, hysteria,

conversion type". In so holding the court drew a distinction between ordinary information and information regarding complicated psychiatric conditions. The Court said:

> "Hospital records are no different from any other kind of records kept in the regular course of business. * * * Regularly recorded facts as to the patient's condition or treatment on which the observations of competent physicians would not differ are of the same character as records of sales or payrolls. * * * But the records before us here are not of that character. *The diagnosis of a psychoneurotic state involves conjecture and opinion. It must, therefore, be subjected to the safeguard of cross-examination of the physician who makes it. And accounts of selected items from interviews with patients must be subjected to the same safeguard.*
>
> "It is no reflection upon the profession of psychiatry to say that it necessarily deals in a field of conjecture. Even in the diagnosis of actual insanity, cases are rare in which trained psychiatric witnesses do not come to opposite conclusions. The opinions here relate to neurosis, a condition short of insanity, on which there are countless theories and infinite diagnostic possibilities. *It is difficult to conceive of records in which the right of cross-examination is more important than the conjectures of a psychiatrist of a psychoneurotic condition.*
>
> "*The drastic impairment of the right of cross-examination resulting from the admission of this type of unsworn observation and opinion evidence will be recognized by anyone familiar with the psychology of a jury trial. The unsworn psychiatric diagnosis would be introduced, with appropriate fanfare as to the distinguished character of the alienist who made it, but who is not called as a witness. The opposing party might have plenty of data to shake this testimony on cross-examination, yet he would have to remain silent while a strong prima facie case is made against him. * * *"*
>
> 147 F. 2d 297, at pp. 303-305.
> (Emphasis added.)

In *Ohio v. Tims*, 9 Ohio St. 2d 136, 224 N.E. 2d 348 (1967), the Supreme Court of Ohio reversed a conviction for statutory rape of a twelve year old girl. The victim was examined at Cincinnati General Hospital and the examining physician filled out a document entitled, "Report of Examination for Alleged Rape". During the course of the trial the State called as a witness a clerk in the medical record room and through her admitted this report into evidence over the objection of the defendant. The Ohio Supreme Court held that the admission of this report into evidence was erroneous and violated the defendant's Constitutional right of confrontation of witnesses against him. The report said that, whatever might be the situation in a civil case, the report could not legally be admitted against the defendant in a criminal case:

> ". . . what may be an acceptable liberalizing of the rules of evidence in civil cases is not necessarily acceptable in a criminal prosecution. The difficulty of obtaining witnesses is not sufficient grounds for liberalizing an exception to the hearsay rule if the effect of such liberalization is to deny an accused a fair trial.
>
> * * * * * * *
>
> "One of the basic and fundamental rights guaranteed an accused by both the State and Federal Constitutions is the confrontation of the witnesses against him. * * * As was said in *Pointer v. State of Texas*, 380 U. S. 400, at 405 . . .:
>
> > 'There are few subjects, perhaps, upon which this court and other courts have been more nearly unanimous than in their expressions of belief that the right

> of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.'

"This right of confrontation includes the right of cross-examination of the person who is the actual witness against him.

"Here, the actual witness against the appellant was the examining physician whose findings were incorporated in the record offered as evidence.

"The effect of admitting hospital records in this type of case would be to allow the examining physician to testify without being subject to cross-examination.

> "The rules of civil procedure are not, therefore, applicable in a criminal case, where such rules would serve to deprive an accused of a constitutional right."
>
> 224 N. W. 2d 348, at pp. 350-1.

Therefore the rights of cross-examination and confrontation deemed so fundamental in our Constitutional scheme were denied to Petitioner by the admission of Mrs. Owensby's testimony, and this alone constitutes ample basis for granting this Petition.

II

Petitioner Was Denied a Fair Trial and Due Process, in Violation of His Rights Under the Fourteenth Amendment, Because the Trial Court's Instructions to the Jury Failed to Properly Instruct the Jury as to the Reasonable Doubt Standard and Its Application.

The trial court erred in its charge to the jury in that it failed to instruct the jury properly as to the State's burden of proving beyond a reasonable doubt that the Petitioner was legally sane at the time of the act and as to the meaning of that burden; failed to give sufficient emphasis to the fact that the only real issue in the case was whether, at the time of the shooting and with respect to that particular act, the Petitioner was legally insane and did not know its nature and quality and did not know that it was wrong; and, the charge, by giving undue attention and emphasis to matters which would not be at issue in the case if the plea of insanity were good, matters which were not in fact contested by the Petitioner at the trial, indicated to the jury that the Court did not believe that a verdict of not guilty by reason of insanity should be returned.

The Court gave the following charge to the jury with respect to reasonable doubt:

> "Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability after such investigation to let the mind rest easily upon the certainty of guilt. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required and this certainly is required as to every proposition of proof requisite to constitute the offense."
>
> T., 764.

It should be noted that there is no attempt made at this point in the charge to *relate* the concept of *reasonable doubt* to the issue of the *sanity or insanity* of the petitioner. The first reference which we have found in the charge to the issue of *sanity* is as follows:

> "The law presumes this defendant on trial to be of sound mind, but this is merely a presumption, and a presumption is not allowed to stand where there is sufficient evidence to overcome it. *When insanity is offered as a defense* or excuse for the commission of an alleged crime, *the burden of proceeding is on the defendant to overcome, by proof, this presumption of sanity and to raise in the minds of the Jury a reasonable doubt* as to whether or not the defendant, at the time the alleged murder was committed, was able to distinguish right from wrong and to know that such act was wrong.
>
> "The Court instructs you that *if there is sufficient evidence introduced* in this hearing *on behalf of the defendant to overcome the presumption of sanity and to raise in your minds a reasonable doubt* as to whether the defendant was able to distinguish right from wrong and know his act was wrong at the time of the commission of the alleged offense, *then* the burden is upon the State to show, by evidence of sanity beyond a reasonable doubt, that at the time of the commission of the alleged offense the defendant was able to distinguish between right and wrong and know that his act was wrong.
>
> "When insanity is offered as a defense or excuse for an alleged crime such insanity must be of such a nature that the mind of the person charged with the crime was so dethroned as to render him unable to distinguish between right and wrong at the time of the commission of the alleged offense.

> "Where the plea of insanity is offered for your consideration, you should consider it justly and fairly along with all the facts and circumstances in the case. In determining the question of whether or not the defendant was insane at the time of the alleged commission of the act, you should consider all his acts at the time of, before and since the alleged commission of the act, if such acts or conduct have been shown by the evidence, and you should consider his appearance and actions during the trial as a circumstance in determining his sanity, at the time of the alleged crime.
>
> "If you find from the evidence, beyond a reasonable doubt, that the defendant committed the crime in the manner and form charged in the indictment, and find, beyond a reasonable doubt, that at the time of committing such crime he was able to distinguish between right and wrong, and know such act was wrong, it is your duty to convict him.
>
> "On the other hand, if, upon the proof, you believe he was not able to distinguish right from wrong and know his act was wrong, or if you have a reasonable doubt as to whether or not he was able to distinguish right from wrong and know his act was wrong, it is your duty to acquit such defendant by reason of insanity at the time of the commission of the offense.
>
> "I charge you that you should return a verdict of not guilty by reason of insanity if you have a reasonable doubt as to whether, at the time of the shooting of his sister, and with respect to the act of shooting her, the defendant either did not know the nature and quality of that act, or if he understood its nature and quality, did not know that the act was wrong. The issue for you to determine is not whether the defendant understood or understands in the abstract or in general the difference between right and wrong or the nature and quality of his actions. And, the

issue is not whether the defendant presently, or at any time before or after the shooting understood the difference between right and wrong or the nature and quality of his acts. The issue is whether or not he understood the nature and quality of that particular act and knew that that particular act was wrong at the time when he committed that act. And, if you have a reasonable doubt whether the defendant, at the time when he committed that act, knew the nature and quality of the act, or a reasonable doubt as to whether, at that very time, knew that that act was wrong, you should return a verdict of not guilty by reason of insanity."

T., 770-775. (Emphasis Added)

The Court then proceeded to list for the jury the various offenses of which they might find the petitioner guilty, charging the jury in each case that the petitioner could be found guilty of the offense concerned only if the jury found him to be guilty thereof beyond a reasonable doubt. But in this portion of the charge the Court did not *relate* its instructions regarding *reasonable doubt* to the issue of *insanity* and did not expressly charge the jury that it should acquit the petitioner of each such offense if the jury had a reasonable doubt as to the petitioner's sanity at the time of the act and with respect to the act. The Court's charge to the jury regarding second degree murder, for example, was as follows:

"If you should find, beyond a reasonable doubt, that the defendant is guilty of Murder in the Second Degree, your verdict should be,

"We, the Jury, find the defendant guilty of Murder in the Second Degree and fix his punishment at imprisonment in the State Penitentiary for not more than .... years,' (inserting in said blank space the maximum term of the convicted defendant at some

period of time not less than ten [10] years nor more than twenty [20] years.)

"If you find the defendant not guilty of this offense, or if you have a reasonable doubt of his guilt of his offense, you will acquit him thereof and then proceed to inquire whether or not he is guilty of Voluntary Manslaughter."

T., 776-777.

On pages 775-778 the Court repeated substantially this same charge with respect to first degree murder, second degree murder, voluntary manslaughter, and involuntary manslaughter. The Court then on page 779 of the Transcript concluded its charge with the following:

"If you find the defendant guilty at all, you must say in your verdict of what degree of felonious homicide the defendant is guilty, and if you do find the defendant guilty, you can convict him of only one of the above named offenses included in the indictment.

"If upon all the proof in the case, you have a reasonable doubt of the defendant's guilt of any of the offenses defined and explained to you, it is your duty to acquit the defendant, and your verdict should be,

'We, the Jury, find the defendant not guilty.'

"On the other hand, if you find from all the proof in the case that the defendant is guilty, beyond a reasonable doubt, of one of the offenses included in the indictment, and you further find that the defendant was not able to distinguish right from wrong and know that his act was wrong, or if you have a reasonable doubt as to whether he was able to distinguish right from wrong and know his act was wrong, your verdict should be,

'We, the Jury, find the defendant not guilty by reason of insanity at the time of the commission of the offense.' "

T., 779-780.

It is extremely important to note that in the last two paragraphs in the charge, the Court again twice stated its charge regarding reasonable doubt without reference to the issue of insanity and only then added, "and you further find that the defendant was not able to distinguish right from wrong and know that his act was wrong, or if you have a reasonable doubt as to whether he was able to distinguish right from wrong and know his act was wrong, . . ." T., 779.

We believe that this method of expressing the law to the jury was extremely confusing to the jury and *that it is likely that some or all of the jurors may have understood that they were being instructed to first determine the Petitioner's guilt or innocence of each offense, applying the reasonable doubt test at that point, but without consideration of the sanity issue, and that they were only to consider the sanity issue after determining guilt, and we submit that there is a serious question whether the jury understood properly the applicability of the reasonable doubt test to the sanity issue.* Therefore the jury may well have failed to understand that they were not to find the Petitioner guilty of any offense unless the State fulfilled its burden of proving beyond a reasonable doubt that the Petitioner was sane at the time of the act and with respect to the act charged.

The law with regard to burden of proof has been discussed extensively elsewhere in this Petition and we will not burden the Court with a repetition of it here. We would, however, call the Court's attention to the following passage from *Isaac v. United States*, 284 F.2d 168 (D.C. Cir., 1969), where the Court of Appeals held that the Trial Court's charge to the jury with respect to the burden of proof on the issue of sanity was confusing and said:

"It is true that the Court correctly stated to the jury several times that the burden of proof was on the Government to establish beyond a reasonable doubt the accused was not suffering from a mental disease or that the acts were not the product of a mental disease. The two conflicting views of the law, the erroneous and the correct, as to the burden of proof were repeated several times in this charge. We cannot speculate that the correct statement obliterated in the minds of the jurors the repeated erroneous statements. We recognize that the problems posed by the burden of proof rule in this respect to the defense of insanity was somewhat difficult but the rule of law is plain and absolutely certain. It should be made plain and certain to the jury in such cases. [Citing *Kwosek v. State*, — Wisc. —, 100 N.W.2d 339]."

We believe that the importance of these contentions can best be appreciated by a complete re-reading of the charge. We believe that upon a re-reading of the charge the Court will agree that the charge failed to convey to the jury the paramount importance of the issue of the Petitioner's sanity and that the charge, by giving primary emphasis to many other matters which were not really at issue in the case, distracted the attention of the jurors from the matter to which they should have been devoting their primary attention. We submit that the Court's charge may have conveyed to the jury, in this way, the impression that the Court did not consider the issue of the Petitioner's sanity to merit serious attention by the Court and the jury.

III

Petitioner Was Denied a Fair Trial and Due Process Because the Court Failed to Instruct the Jury Properly as to the Application of the So-Called M'Naghten Rule, in That the Court Several Times Stated That Portion of the M'Naghten Rule Relating to the Ability to Distinguish Right From Wrong Without Stating That Portion of the Rule Relating to Knowledge of the "Nature and Quality" of the Act.

The portion of the charge to which we refer is that which appears on pages 770 and following of the Transcript, quoted in this Petition just above at pages 64-69. It should be noted that although the Court does state the M'Naghten Rule correctly on page 774 and following, the Court's statement of the Rule on pages 771 through 773 is not correct. The Court misstated the M'Naghten Rule in that, while stating that portion of the Rule relating to the ability to distinguish right from wrong with respect to the act, the Court did not state that portion of the Rule relating to knowledge of the "nature and quality" of the act. The only reference which we have found in the charge to the "nature and quality" of the act is on page 774, by which time the Court had several times stated the Rule without any reference to the "nature and quality" of the act. On pages 771 and following the Court repeatedly instructed the jury that the issue to be determined was "whether the defendant was able to distinguish right from wrong and know his act was wrong". We believe that that portion of the M'Naghten Rule which requires the jury to determine whether the defendant knew the nature and quality of his act is a crucially important portion of the Rule and that the Court's repeated statement of the Rule omitting this portion constitutes reversible error. See for example *Spurlock v. State*, 212 Tenn. 132, 368 SW2d 299 (1963), where the Court said:

> "We, in this State, for nearly a hundred years, have followed the view quoted below:

> 'The prevailing view, however, is apparently to the effect that the capacity of the accused to distinguish right from wrong in respect of the act charged as a crime at the time of its commission is made the test of his responsibility, and not his capacity or ability to distinguish right from wrong in the abstract. Hence, as a composite rule, if a person at the time of the commission of an alleged crime has sufficient mental capacity to understand the nature and quality of the particular act or acts constituting the crime and to know whether they are right or wrong, he is responsible if he commits such act or acts, whatever may be his capacity in other particulars; but if he does not possess this degree or capacity, then he is not so responsible.' "
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> 368 SW2d 299, at p. 301.

We submit that it is clear from the proof in the instant case that, whether or not George Edwards knew right from wrong at the time of the shooting, he clearly did not know the nature and quality of his act, and that it was therefore especially important that the jury understand this portion of the M'Naghten Rule if Edwards was to receive a fair trial.

IV

Petitioner Was Denied a Fair Trial and Due Process Because the Jury Was Instructed to Determine Whether the Presumption of Insanity Had Been Overcome or Remained in the Case at the End of the Proof, When the Presumption of Sanity Had, Prior to the Conclusion of the State's Proof, and Certainly Prior to the End of the Trial, Been Overcome as a Matter of Law and the State Was, by That Time, as a Matter of Law, Clearly Under the Burden of Proving Beyond a Reasonable Doubt That the Petitioner Was Not Legally Insane at the Time of the Act and With Respect to the Act.

The portion of the charge to which we refer is at T., 777ff, and especially the second paragraph on page 771 where the Court says:

> "The Court instructs you that *if* there is sufficient evidence introduced in this hearing on behalf of the defendant to overcome the presumption of sanity and to raise in your minds a reasonable doubt as to whether the defendant was able to distinguish right from wrong and know his act was wrong at the time of the commission of the alleged offense, *then* the burden is upon the State to show, by evidence of sanity, beyond a reasonable doubt that . . ."
>
> T.,771. (Emphasis added.)

The point is simply that, contrary to what the jury was instructed in this portion of the charge, the jury did not have the duty of determining whether the presumption of sanity had been overcome. The presumption of sanity did not exist and should not have been mentioned to the jury at all. The Court spent approximately one and one-half pages of the charge discussing the presumption of sanity and instructing the jury to give some weight to it and to determine whether it had been overcome. This may very well have misled and confused some

or all of the jurors and clearly constitutes, we submit, reversible error.

As the Tennessee Supreme Court said in one of its earliest decisions (1871) involving the insanity defense, *Dove v. State*, 50 Tenn. 348, at 371 (1871), when any evidence of insanity appears the presumption of insanity is neutralized:

> "it is overturned, it ceases to weigh, and the jury are in reasonable doubt. How, then, can a presumption, which has been neutralized by countervailing proof. be resorted to to turn the scale?"

See also *King v. State*, 91 Tenn. at 648 (1892), and *Richard v. State*, — Tenn.Crim.App. — (filed March 8, 1972), at page 11 (quoting *King, supra*); Appendix K, pp. A-124ff.

V

Petitioner Was Denied a Fair Trial and Due Process Because the Court Refused to Instruct the Jury as to the Meaning, Effect, and Consequences of a Verdict of Not Guilty by Reason of Insanity and Prohibited Petitioner's Attorneys From Discussing This Subject, During *Voir Dire* and Argument.

The Court failed and refused to give any instruction to the jury setting forth the meaning, effect, and consequences of a verdict of not guilty by reason of insanity. See in this connection T., Vol. I, pp. 3-10; 12-28; 30; T., 745-8; and Special Requests 15, 5, 4, 2, 1 found in Appendix N, pp. A-167-169. Petitioner maintains that this refusal was Constitutional error.

We have continued to attempt, in the development of American criminal law, to eliminate therefrom to the extent possible all elements of chance. We have attempted to get away from the "sporting theory" of justice and to take such steps as are

reasonably possible to insure that the decisions of juries and Courts will be made upon rational bases. And we submit that to leave a jury's understanding of the consequences of a verdict of not guilty by reason of insanity to chance is to deliberately inject into the decision making process an irrational element, and that this denies to the defendant his right to a rational and orderly consideration of his case upon the merits. We would also contend that it denies him due process and fair trial in violation of the Fourteenth Amendment to the United States Constitution.

We believe that the best reasoned decisions on this subject are those of the Court of Appeals for the District of Columbia and the Michigan Supreme Court. See, for example, *Taylor v. United States*, 222 F.2d 398 (DC, Cir., 1955); *Lyles v. United States*, 254 F.2d 725 (DC Cir. 1957) *cert. den.* 356 U.S. 961 (1958). 362 U.S. 943 (1958), and 368 U.S. 992 (1962); *Catlin v. United States*, 251 F.2d 368 (DC Cir., 1957); *McDonald v. United States*, 312 F.2d 847 (DC Cir., 1962). See also *People v. Cole*, 382 Mich. 695, 172 N.W.2d 354 (1969). *Kuk v. Nevada*, 80 Nev. 291, 392 P.2d 630 (1964); *People v. Hampton*, 23 Mich. App. 190, 178 N.W.2d 551 (1970); *Nelson v. State*, 35 Wisc.2d 797, 151 N.W.2d 694 (1967); and *State v. Shoffner*, 31 Wisc.2d 412, 143 N.W.2d 458 (1966).

The principal bases for the conclusion of the Court of Appeals for the District of Columbia that such an instruction should be given appear to be: (1) that although the consequences to the defendant of a verdict of not guilty by reason of insanity may be of no theoretical concern to the jury, they are of "practical" concern, and (2) that although the average juror may be assumed to have a fairly accurate understanding of what will happen if he votes "guilty" or "not guilty", he is most unlikely to know the consequences of a verdict of "not guilty by reason of insanity", and he is very likely to be influenced, in making his decision, by whatever notion he may have as to the consequences thereof.

In *Taylor v. United States*, 222 F.2d 389 (DC Cir., 1955), at p. 404, the Court of Appeals for the District of Columbia said, referring to its holding that the jury should be instructed as to the meaning and effect of a verdict of not guilty by reason of insanity, "Though this fact has no theoretical bearing on the jury's verdict, it may have a practical bearing." The same Court said in *Lyles v. United States*, 254 F. 2d 725 (DC Cir., 1957), at p. 728:

> "This point [the question whether the jury should have been instructed as to the meaning and effect of a verdict of not guilty by reason of insanity] arises under the doctrine, well established and sound, that the jury has no concern with the consequences of a verdict, either in the sentence, if any, or the nature or the extent of it, or in probation. But we think that the doctrine does not apply in the problem before us. The issue of insanity having been fairly raised, the jury may return one of three verdicts, guilty, not guilty, or not guilty by reason of insanity. *Jurors, in common with people in general, are aware of the meanings of verdicts of guilty and not guilty.* It is common knowledge that a verdict of not guilty means that the prisoner goes free and that a verdict of guilty means that he is subject to such punishment as the Court may impose. *But a verdict of not guilty by reason of insanity has no such commonly understood meaning.* As a matter of fact its meaning was not made clear in this jurisdiction until Congress enacted the statute of August 9, 1955. It means neither freedom or punishment. It means the accused will be confined in a hospital for the mentally ill until the superintendent of such hospital certified, and the Court is satisfied, that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others. *We think the jury has a right to know the meaning of this possible verdict as accurately as it knows by common knowledge the meaning of the other two possible verdicts.*

"We do not prescribe a form of instruction. We think a recitation of the statutory procedure in great detail, such as a reading of the entire section of the statute, would tend to increase confusion. We think that when the instruction is given the jury should simply be informed that a verdict of not guilty by reason of insanity means that the accused will be confined in a hospital for the mentally ill until the superintendent has certified, and the Court is satisfied, that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or to others, and at which time the Court shall order his release either unconditionally or under such conditions as the Court may see fit."

(Emphasis added.)

In *People v. Cole*, 382 Mich. 695, 172 N. W. 2d 354 (1969) at pp. 364 and following, the Michigan Supreme Court, while recognizing that as a general rule the assessment of punishment is a question of law which is exclusively within the province of the Court, so that instructions as to punishment should not be given to the jury, held nevertheless that the jury should be instructed as to the consequences of returning a verdict of not guilty by reason of insanity. The Court said in this connection:

". . . we recognize as an inherent problem, in extending this general rule to the facts of the instant case, that the post-verdict status of one acquitted on grounds of insanity is not 'punishment' in the true sense or usage of that word."

172 N. W. 2d 354, at 365.

The Court quoted extensively from the Court of Appeals for the District of Columbia's opinion in *Lyles v. United States, supra*, and said:

"This appeal makes it mandatory that this Court choose between: (1) the possible miscarriage of justice by imprisoning a defendant who should be hospitalized, due to refusal to so advise the jury; and (2) the possible 'invitation to the jury' to forget their oath to render a true verdict according to the evidence by advising them of the consequences of a verdict of not guilty by reason of insanity.

"We conclude that the reasons given in support of the first proposition far outweigh the fear of jury integrity expressed in the second propisition.

"We believe that *Lyles v. United States, supra*, is the better reasoned authority and hold that in all criminal trials or retrials taking place after the date of the filing of this opinion, whether defense of insanity is present and that issue is made submissible by the proofs, the defendant, upon his own timely request, or upon request of the jury, shall be entitled to instruction in accord with the rule of *Lyle*."

172 N.W. 2d 354, at 366.

It should be noted that, in the above cases, both the Court of Appeals for the District of Columbia and the Supreme Court of the State of Michigan saw, as the major obstacle to the adoption of the rule requiring such an instruction, the authorities in their jurisdictions to the effect that punishment was a matter for the Court. The Annotation, "Instructions in Criminal Case in which Defendant Pleads Insanity as to his Hospital Confinement in the event of Acquittal", 11 ALR 3d 737, points out that most of the decisions holding that no such instruction is necessary are based upon the doctrine "that in a criminal case, as in a civil case, it is the province of the Court, not the jury, to decide all questions of law, among which is, in the absence of a contrary statute, the punishment to be fixed" and that it is "accordingly, a general rule that where the assessment of punishment is for the Court, instructions as to punishment are ununecessary and should not be given, since they will not aid the jury

in determining the issue of guilt". 11 ALR 3d 737, at 739. It is important to recognize that this is the primary basis of the decisions denying such instructions because, of course, in Tennessee punishment is a matter for the jury. Therefore, the principal basis upon which the Courts have decided to the contrary in other jurisdictions is simply not present in Tennessee.

Many of the decisions from other jurisdictions which refuse to grant specially requested instructions to the jury regarding the consequences of a verdict of not guilty by reason of insanity base such refusal upon objections to the partiular language of the instruction which is specifically requested. See Annotation, "Instructions in Criminal Court in which Defendant Pleads Insanity as to his Hospital Confinement in the Event of Acquittal", 11 ALR 3d 737. The refusal to grant such an instruction in the instant case cannot be justified upon that ground because the Petitioner tendered to the Court Special Requests (Appendix N, at pp. A-167-169 which fully cover the range of possible wordings, from the specific to the general.

In any event, even if the Court's failure to instruct the jury as to the meaning and effect of an insanity verdict was not a denial of Petitioner's Fourteenth Amendment rights, he was denied Due Process and a fair trial when the Court at the same time allowed Mrs. Owensby in her testimony and the State's Attorney in his argument to create in the minds of the jurors the impression that Petitioner would go free if an insanity verdict were returned, and to clearly charge that Petitioner was faking insanity to achieve such freedom.

Mrs. Owensby's testimony on this subject has been discussed above at pages 41ff.

The portions of the State's Attorney's argument to which we refer, where he states and implies in the strongest terms that, upon a verdict of insanity, Petitioner would go free, is as follows:

"What happens later, gentlemen? He starts out right away trying to avoid what he has done. He knew that he had done wrong and he starts a pattern to avoid it.

"The proof shows that the defendant is not a dumb person. As a matter of fact, he is a rather intelligent individual.

"And what does he do, gentlemen? First, which is logical, I don't blame him, I would hire me a good lawyer too. But what happens shortly? He goes into psychiatry, John Gaston Hospital. He is all right over there. Nobody has any problems with him. As a matter of fact, while he was there and even before, he set up on this design to convince you gentlemen that he was insane. Dr. Aivazian says he was fine. Do you think that the wheels had started turning a little bit?

> 'I have got to do something erratic to convince people that I am crazy.'

"Sets his mattress on fire. But let me ask you this, gentlemen: he had sense not to sit down in it, didn't he? Huh? Why didn't he set himself afire? Why didn't he lay down in the mattress? That would be consistent with a person who was mentally disturbed, but he didn't. And since he didn't, that would be consistent with the fact that he was not insane.

"He said he heard voices. He could very well have heard voices. I have heard voices through vents and possibly you have too if you happen to be in the right area, in a motel, or something like that, you could hear, if you happen to be where there is a vent, or even maybe here. That is not unusual, gentlemen.

"But was he setting out on a design because he knew that one day he would be called to the Bar of twelve men to answer what he had done?

"He went to Central State. No problem before he went to Central State. The doctors say he was fine. He was orientated, but out of an abundance of precaution he went to Central State. Central State stated that when he was there, there was no problem, that he knew right from wrong. He knew the nature of the offense and he knew or had the ability to aid in the defense of his own lawsuit to the extent, gentlemen, that something that you may not even be able to know unless you had been into that area, and he probably just picked it up from hearing the psychiatrists talk. *But he knew the possibilities of how he could avoid any punishment whatsoever.*

"If you find him guilty, he is writing his own verdict before he is even tried, gentlemen. If you find him not guilty by reason of insanity, what is the result of that? Not guilty means you are not guilty. But if you find him guilty, that means confinement, gentlemen. He doesn't particularly care for this. I don't blame him. I think that is a normal assumption there. I am not trying to be facetious. That is a kind of a normal reaction, to avoid the inevitable.

"Don't become confused, gentlemen. Mr. Edwards would not be on trial here today for his liberty if he was presently insane. He is sane, gentlemen. Mr. Edwards today sitting before you is sane, and, according to their own defense of Dr. Aivazian, he was sane five or seven days after the commission of this act. Don't be fooled by this plea of insanity. Don't let George Edwards fool you in his plea of insanity, gentlemen. Look to the facts. That's where you are to render your decision."

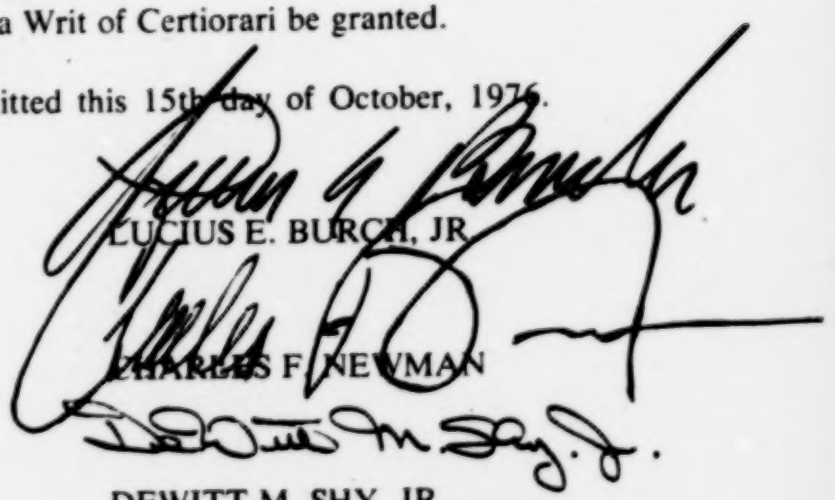
T. 705-708 (Emphasis added.)

There were other such statements and implications in the arguments of the State's attorneys.

CONCLUSION

For the reasons stated herein, Petitioner respectfully prays that this Petition for a Writ of Certiorari be granted.

Respectfully submitted this 15th day of October, 1976.



LUCIUS E. BURCH, JR.

CHARLES F. NEWMAN

DEWITT M. SHY, JR.
BURCH, PORTER & JOHNSON
130 North Court
Memphis, Tennessee 38103
Attorneys for Petitioner

Certificate of Service

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari were mailed, with first class postage prepaid, to the Respondent, Brooks McLemore, Attorney General, State of Tennessee, Supreme Court Building, Nashville, Tennessee 37219, this the 15th day of October, 1976.

CHARLES F. NEWMAN
BURCH, PORTER & JOHNSON
130 North Court
Memphis, Tennessee 38103
Attorneys for Petitioner

Supreme Court, U. S.
FILED
OCT 16 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-533

GEORGE S. EDWARDS,
Petitioner,

versus

STATE OF TENNESSEE and BROOKS McLEMORE,
Attorney General of the State of Tennessee,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of Tennessee

LUCIUS E. BURCH, JR.
CHARLES F. NEWMAN
DeWITT M. SHY, JR.
BURCH, PORTER & JOHNSON
130 North Court
Memphis, Tennessee 38103
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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APPENDIX A

Thursday, February 22, 1973

Court met pursuant to adjournment, Hon. James C. Beasley, Judge presiding; whereupon the following proceedings were had to-wit:

State of Tennessee

vs. B-34712 Murder in the First Degree

George Stratton Edwards

Comes the Attorney General on the part of the State and the defendant in proper person and by counsel of record, Mr. Lucius E. Bruch Jr. and Mr. Charles F. Newman; whereupon there comes into open Court under charge of their proper officer the same Jury heretofore selected to try the cause. Thereupon the Jury resumes deliberation on their verdict in the cause, and upon completion, the Jury upon their oath do say: "We the Jury, Find the Defendant Guilty of Murder in the Second Degree and Fix His Punishment at Imprisonment in the State Penitentiary for Not More Than Ten (10) Years."

Thereupon the Court proceeds to pass sentence, which is that: After a fair and impartial trial, the Jury having found you guilty of the offense of Murder in the Second Degree as included in the indictment, it is the Judgment of the Court that you be taken by the Sheriff and remanded to Jail and at the earliest convenience delivered to the Warden of the State Penitentiary, therein to be confined at hard labor for a period of Not More Than Nor Less Than Ten (10) Years; and that you pay the cost of this prosecution, for which let mittimus and execution issue. Thereupon counsels for the defendant, moves

the Court for a New Trial, which motion is set for hearing on March 23, 1973 and the defendant is allowed to remain on the same bond pending the hearing of this Motion for a New Trial. It is ordered that an Order be entered per the conditions of defendant's bail.

Whereupon Court adjourned until tomorrow morning at 9:30 o'clock.

s JAMES C. BEASLEY
Judge

APPENDIX B

Court of Criminal Appeals of Tennessee, at Jackson

George S. Edwards,
vs.
State of Tennessee.

No. 23, Shelby County
Offense: Murder in the Second Degree
Affirmed. No. B-34712

JUDGMENT

Came the plaintiff.. in error George S. Edwards by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Shelby County; and upon consideration thereof this Court is of opinion that there is no reversible error on the record and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by this Court.

It is, therefore, ordered and adjudged by this Court that the plaintiff.. in error, for offense of Murder in the Second Degree be delivered to the Warden of the penitentiary, or his agent, and be by him committed to the penitentiary of the State of Tennessee and there confined at hard labor for a term of not more than Ten years, and not less than Ten years, commencing on the day of His reception at said penitentiary.

The sentence of imprisonment will be credited with the time the plaintiff.. in error spent in jail pending this appeal. The number of days of such confinement will be certified to the Warden by the Clerk of the Court below.

The plaintiff.. in error will pay the costs of the cause accrued in this Court, and in the Court below, and execution may issue

from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Shelby County, directing that Court to proceed with the collection of the costs of the cause accrued therein in the manner provided by law.

The Clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Shelby County, which will be his authority for delivering the plaintiff.. in error to the Warden or his agent; and also a duly certified copy hereof to the Warden of the penitentiary, who will at once proceed to execute this judgment.

In the event the plaintiff.. in error files a petition for certiorari in the Tennessee Supreme Court, He may be admitted to bail on bond in the penalty of $20,000.00 with sufficient sureties to be approved by the Clerk of this Court, conditioned as in bail bonds in felony appeals, for His appearance in the Supreme Court; and in default of such bond He will be remanded to the Sheriff of Shelby County.

. . . . . .

. . . . . .

. . . . . .

Office of Clerk of the Court of Criminal Appeals for the Western Division of the State of Tennessee:

I, Jewel Redden, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the judgment of said Court pronounced at its October Term, 1973, in the case of George S. Edwards vs. State of Tennessee, as the same appears of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office, in Jackson, Tenn., on this the 22nd day of July, 1974.

/s JEWEL REDDEN
Clerk

/s/ SUE GRANGER
D.C.

cc Court below
Sheriff
Warden
Cost Bill

Felony—Affirmed

(SEAL)

In the Court of Criminal Appeals of Tennessee
Jackson, November, 1973

George S. Edwards, Plaintiff-in-error, v. State of Tennessee, Defendant-in-error.	No. 23 Shelby County Hon. James C. Beas-ley, Judge (Second Degree Murder)

(Filed July 22, 1974)

For Plaintiff-in-Error:
Lucius E. Burch, Jr. and
Charles F. Newman
Memphis, Tennessee

For Defendant-in-Error:
David M. Pack
Attorney General
Robert H. Roberts
Assistant Attorney General
Ewell Richardson and
Joe Patterson
Assistant District Attorneys General

Affirmed

Opinion Filed: July 22, 1974.

WILLIAM S. RUSSELL
Judge

OPINION

This is an appeal in the nature of a writ of error by George S. Edwards from a conviction for murder in the second degree, with a resulting penitentiary sentence of ten years. Plaintiff-in-error has filed thirty-six assignments of error. However, as stated by Edwards in his brief, "The only real issue in the

case was whether, at the very time of the shooting and with respect to that particular act, the plaintiff-in-error was legally insane and did not know the nature and quality of that act or, if he did know its nature and quality, did not know that it was wrong."

The evidence shows that Edwards shot and killed his sister with no apparent provocation. The sister had joined him and his wife for a visit at their home, and was killed in plaintiff-in-error's bedroom with a single shot from his .38 calibre revolver. Plaintiff-in-error's wife fled as he fired two more shots, presumably at her.

The proof shows that Edward's family had a history of mental instability, and that he had been under the care of a psychiatrist prior to the shooting.

The jury had the benefit of testimony from a large number of witnesses, both lay and expert, on the issue of sanity. Plaintiff-in-error's mother visited him some five hours before the shooting, and stated that he appeared withdrawn but seemed to understand what was going on around him. A housekeeper employed by him for more than a year prior to the shooting testified that she was in the Edward's home during the day of the shooting and that she was under the impression that nothing was wrong with him. Another witness, who was an in-law of plaintiff-in-error and had known him for years, testified that he had visited Edwards several hours before the shooting and he had asked him to help lay a rug. The plaintiff-in-error appeared normal to him, and to know the difference between right and wrong. The testimony of another relative who visited Edwards before the killing was similar and to the effect that he appeared normal and to know right from wrong. The officers who answered the call after the shooting stated that plaintiff-in-error acted like a normal person under the circumstances. Other officers who took a statement from Edwards testified that he ad-

mitted shooting his sister, that she had sinned too much, and that she was better off dead. He appeared to understand everything they talked to him about, was calm, and indicated no remorse over what he had done.

Edwards offered two expert witnesses, Dr. Parks Walker and Dr. Garo Aivazian, both psychiatrists. Dr. Walker had treated plaintiff-in-error prior to the shooting, while Dr. Aivazian had seen him subsequently, but both doctors were of the opinion that he did not know right from wrong at the time he shot his sister.

The State called Mrs. Nona Ownsby in rebuttal. Mrs. Owensby, a psychologist with Central State Hospital, testified that she was of the opinion that Edwards knew right from wrong at the time of the shooting. Mrs. Owensby had interviewed, tested, and observed him at Central State after the shooting. She stated that plaintiff-in-error told her that he never really had any mental illness, but talked extensively about symptoms of mental illness, and talked about being found not guilty by reason of insanity. The director of Central State's Forensic Services, a psychiatrist, testified that he was out of the country during most of the examination of Edwards, and that although Edwards was competent to stand trial, he could express no opinion as to plaintiff-in-error's condition on the date of the shooting.

The rule in Tennessee is that insanity is a question of fact for the jury, under proper instruction from the court. *Spurlock v. State*, 212 Tenn. 132, 368 S.W.2d 299. The jury was able to have the assistance of witnesses, both lay and expert, in making their determination on the question. This was a hotly contested issue, with disagreement among the experts as to plaintiff-in-error's sanity. Dr. Battles, a clinical psychologist on Dr. Aivazian's evaluation team, reported that he felt plaintiff-in-error was not insane after the shooting but could not reach an opinion as to his condition at the time of the murder. Mrs. Owensby felt plaintiff-in-error to be sane at the time of the shooting. And

the testimony of the several lay witnesses who observed plaintiff-in error before and after the shooting certainly supports a finding that plaintiff-in-error was sane. Under these facts, we are bound by the rule that the verdict of the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflict in favor of the theory of the State. *McBee v. State*, 213 Tenn. 15, 372 S.W.2d 173.

In view of the foregoing, the first three assignments of error attacking the legal sufficiency of the convicting evidence are overruled.

The fourth assignment of error contends that counsel for Edwards was improperly stopped, on voir dire, from going into the meaning and effect of a verdict of not guilty by reason of insanity. The purpose of voir dire is stated in the case of *Smith v. State*, 205 Tenn. 502, 327 S.W.2d 308, and the trial court did not abuse his discretion in controlling the extent of the voir dire examination.

Assignments five, six, twelve, and thirteen all deal with the order of witnesses and the issue of rebuttal testimony. Further, plaintiff-in-error maintains the court should have called Dr. Fidelholtz as the court's witness. The areas of rebuttal testimony and control of the order of proof are within the discretion of the trial court. *Essary v. State*, 210 Tenn. 220, 357 S.W.2d 342; *Dezarne v. State*, — Tenn.Crim.App. —, 470 S.W.2d 25. We find no abuse of that discretion. On the matter of the trial court calling its own witnesses, we hold that the trial court properly refused to call Dr. Fidelholtz as its witness. See *Montesi v. State*, 220 Tenn. 354, 417 S.W.2d 554.

Assignments seven, eight, nine and ten relate to the testimony of the psychologist, Mrs. Owensby. Mrs. Owensby examined plaintiff-in-error, and her opinion as to his sanity was properly received. It was permissible to ask Mrs. Owensby about the

basis for her opinion, including the statements of others and plaintiff-in-error himself. It is noted that there was no objection to the testimony of Mrs. Owensby wherein she related what plaintiff-in-error had told her.

Assignment of error eleven maintains that the trial court erred in allowing the State's attorney to imply in his final argument that plaintiff-in-error would not be subject to confinement upon a verdict of not guilty by reason of insanity, but would be set free. Objection was not seasonably made to this argument, as is required. Nor does the argument complained of go beyond the facts. The State's attorney is an advocate just as is defense counsel, and "proper oratorical emphasis is denied to neither". *Henderson v. United States*, 218 F.2d 14, cert.den. 75 S.Ct. 660.

Assignments of error fourteen and fifteen contend that it was error to allow lay witnesses to express their opinion on the sanity issue, and that there was not adequate foundation laid to support their opinion or qualify the witnesses. The unobjected to opinion of these lay witnesses was based upon personal knowledge and observation as required by *Atkins v. State*, 119 Tenn. 458, 105 S.W.2d 353, and *Wilcox v. State*, 94 Tenn. 106, 28 S.W.2d 312. We hold that the lay witnesses were properly allowed to testify.

Assignments sixteen through twenty-one deal with the failure of the trial court to give the jury instructions as specially requested on the meaning and consequences of a verdict of not guilty by reason of insanity. Plaintiff-in-error cites no Tennessee authority requiring a trial court to so instruct a jury, and we overrule the assignments.

Assignments twenty-two through twenty-six assign error in the court's denial of certain special requests for additional jury instructions.

It is not error to refuse a special request where it does not correctly state the law, *Cooper v. State*, 53 Tenn. 37, 138 S.W. 826, or where the charge as given fully and fairly states the applicable law, *Bostick v. State*, 210 Tenn. 620, 360 S.W.2d 472. The trial court properly refused to give the instructions as requested.

Assignments of error twenty-seven, twenty-eight, thirty-one, and thirty-two involve the trial court's instructions to the jury on the State's burden of proof on the insanity issue and the application of the M'Naughten rule. The charge as given fully and fairly states the law on insanity, both as to the burden of proof and the M'Naughten rule, and these assignments are without merit.

Assignment twenty-nine contends the court's instructions to the jury with respect to expert witnesses were in error, while assignment thirty says that it was error for the court to fail to charge that lay witnesses' testimony on sanity should be approached with the same degree of caution as is used in weighing expert testimony. The charge on expert witnesses is in accord with our case law on the subject, and the jury was properly instructed to receive the expert testimony with caution. To have done otherwise would be to "preempt our jury trial system on sanity issues and replace it with a system of trial by psychiatrists' opinions" as was condemned in *Brooks v. State*, — Tenn. Crim.App. —, 489 S.W.2d 70. In regard to the charge on lay witnesses, the trial court properly preserved the distinction between lay and expert witnesses as expressed in *Wilcox v. State*, supra.

The thirty-third and thirty-fourth assignments of error deal with the trial court's response to questions asked by the jury after they had retired to deliberate. A juror asked the court a question dealing with insanity, and the court refused to answer, saying instead that it was a question for the jury to determine from the instructions and the evidence. This was not error,

because in view of the complete instructions on insanity already given, any additional instruction would have served only to confuse the jury or unfairly emphasize a certain point of law. Furthermore, since the judge did not give any instruction, he was at liberty to make an oral response, without reducing it to writing.

The last two remaining assignments of error are covered in our discussion of the other thirty-four, and are likewise without merit.

Affirmed.

/s/ WILLIAM S. RUSSELL
WILLIAM S. RUSSELL, Judge

Concur:

/s/ ROBERT K. DWYER
ROBERT K. DWYER, Judge
CHARLES H. O'BRIEN, Judge

In the Court of Criminal Appeals of Tennessee
Jackson, November Session, 1973

George S. Edwards,
Plaintiff in Error,
v.
State of Tennessee,
Defendant in Error.
No. 23
Shelby County

DISSENTING OPINION

(Filed July 22, 1974)

I respectfully dissent from the majority opinion in this case.

The rule followed in this State as the test for criminal responsibility of a person for his acts is discussed at length in *Spurlock v. State*, 212 Tenn. 132, 368 S.W.2d 299:

" 'The prevailing view, however, is apparently to the effect that the capacity of the accused to distinguish right from wrong in respect of the act charged as a crime at the time of its commission is made the test of his responsibility, and not his capacity or ability to distinguish right from wrong in the abstract. Hence, as a composite rule, if a person at the time of the commission of an alleged crime has sufficient mental capacity to understand the nature and quality of the particular act or acts constituting the crime and to know whether they are right or wrong, he is responsible if he commits such act or acts, whatever may be his capacity in other particulars; but if he does not possess this degree or capacity, then he is not so responsible.' " 14 Am.Jur., Sec. 40, Page 797.

This is the McNaghten Rule (McNaghten's Case, 10 Cl. and Fin. 210, 8 Eng. Reprints 722 (1843) which is the test of criminal accountability in cases wherein insanity at the time of the crime is advanced as a defense. *Sparkman v. State*, — Tenn.Crim.App. —, 469 S.W.2d 692.

It is the duty of the State to prove all the essential elements on this issue beyond a reasonable doubt. See *Dove v. State*, 50 Tenn. 348, p. 371.

As stated in the majority opinion, the jury had the benefit of testimony from a large number of witnesses, both lay and expert, on the issue of sanity. However, an examination of the bulk of this testimony sheds little light on defendant's mental condition at the time the homicide occurred. A neighbor testified that after the shooting Mrs. Edwards, wife of the defendant, reached her home and stated in substance, "Get back from the windows, turn out the lights, that man is crazy." This witness called defendant's psychiatrist, apparently at the request of his wife. The testimony of the housekeeper was that she never had any close contact with defendant, she did her work

and he tended to his business, and they didn't get in each other's way. Everything was pleasant between them. Police officers testified about defendant's conduct, actions, and condition as to sobriety after the homicide took place. Of course, this testimony was admissible in order to characterize defendant's conduct after the shooting as rational or irrational, and in regard to his state of sobriety, however, it adds little to the evidence of defendant's criminal responsibility at the time of the crime, and is entitled to little weight due to the officers' limited opportunity to observe. Two of defendant's relatives by marriage visited with him earlier in the evening; one about three hours before the homicide, and the other two or three hours before that. They each testified he appeared normal at that time, and appeared to know the nature and quality of his acts and had the ability to tell the difference between right and wrong. Another sister of defendant's wife had called the defendant on the telephone on the evening of the homicide. She, as well as her husband, described defendant's general conduct over the past years they had known him and she said he appeared normal in the telephone conversation. Both she and her husband testified that during the years they were acquainted with defendant he appeared to know the difference between right and wrong. There was also expert testimony in addition to the lay witnesses.

Dr. Parks Walker had treated the defendant on a professional basis since November 4th, 1971, for some several months prior to the date of the homicide on June 7th, 1972. He testified in detail regarding his observations and treatment of defendant over this period of time. His initial impression of defendant was that he had all the major symptoms of schizophrenia, which is a major mental disorder where a person has a loss of good contact with reality, and where his judgment becomes impaired and where his behavior may be such that he legally would engage himself in what might be called insane behavior. He prescribed various drugs during the course of his treatment, and

stated the changes in defendant's condition during that time, as well as the reasons for his impressions and diagnosis from his observation. He related that defendant had stopped taking the prescribed medication several weeks before the date of the homicide, and the last time he had seen him approximately one week before June 7th, 1972, he was in a morose, and deeply depressed state. At that time he was placed back on medication and was to return in two weeks with the understanding that if he hadn't improved he would be hospitalized. The doctor continued his treatment of defendant after the shooting, and described his symptoms, conduct, and reactions. It was his opinion that at the time of the killing, defendant was laboring under such a defect of reasoning from disease of the mind as not to know the nature and quality of his acts, or if he did know it, that he did not know what he was doing was wrong, and that he did not know right from wrong.

Dr. Garo Aivazian, Professor of Psychiatry and Chairman of the Department of Psychiatry at the University of Tennessee College of Medicine was called in as a consultant after the homicide. Between June 12th and August 14th, 1972, he examined defendant on seven separate occasions. He received a psychological consultation done by Dr. Allen Battle, a clinical psychologist, which included his findings and a report about defendant's condition as they were observed and interpreted on the basis of a series of psychological tests and methods of examination. Dr. Aivazian took a longitudinal life history from birth which included defendant's personal history, his growth and development, adjustment to life, school record, work record, military record, and family history which consisted of the family history of his natural parents and the environment in which defendant was born and raised, as well as his family history in respect to his married life. It was his opinion that at the time of the shooting defendant was psychotic to the degree whereby his ability to recognize what was around him as the environment and to test the environment and its realities was impaired to a

degree whereby he was not capable of deciding between right and wrong and was not capable of adhering to any decision because he could not decide between right and wrong.

There was a lengthy history of mental illness in defendant's family. On the maternal side an uncle had died at Western State Hospital, two cousins, daughters of another uncle were undergoing psychiatric treatment. On his father's side defendant's great grandmother had died in Mississippi State Insane Asylum and an uncle had died in a Veteran's Hospital in Murfreesboro. His grandfather had been a patient in a psychiatric hospital in Memphis.

Dr. Jacob Norman Fidelholtz was called by defendant and testified he was assistant superintendent of Central State Psychiatric Hospital, in charge of the Forensic Services Division. Insofar as defendant's condition on the date of the homicide is concerned he stated that neither he nor his staff expressed any opinion as to whether or not defendant was psychotic on that date. From their findings defendant had the ingredients to have a psychotic break, possibly a schizophrenic break under duress or under a lot of stress. Of his own knowledge he could not say the extent to what stress defendant was under on June 7th, or whether or not he became psychotic as a result of that stress. In his opinion, Dr. Aivazian and Dr. Walker would have superior diagnostic opportunities to evaluate defendant as of June 7th, 1972, because they saw the patient within days following the act and he did not come to Central State until several months later.

Mrs. Nona Owensby testified for the State as an expert that she was psychologist in the Forensic Services Division of Central State Psychiatric Hospital. She had obtained her A.B. Degree from Trevecca College, her Masters Degree from Vanderbilt, had graduate study at Peabody, and all the requirements at Vanderbilt University for the Ph.D., except for finishing her

dissertation. She was licensed as a psychological examiner by the State of Tennessee, a member of the American Psychological Association and the Tennessee Psychological Association, had worked for nine and one-half years in the Forensic Services Division and had taken part in the evaluation of thousands of criminal male offenders. She says defendant was admitted for examination on September 26th, 1972, and discharged on October 26th, 1972. During that time she conducted several individual interviews with him, group interviews of various kinds, and supervised psychological tests given him. She observed him in the hospital in everyday routine. Reports from the State and defense counsel and records concerning defendant's background were included in his Central Record record file. She had access to this material, which she read and studied. As the result of defendant's stay at the institution and her study of the records, she formed the opinion that defendant did know right from wrong on June 7th, 1972. A great deal of this witness' testimony dealt with her conversations and observations of him while he was in the hospital, during all of which time, except for the day of his admission, defendant was being administered a strong anti-psychotic drug which was a major tranquilizer.

There is considerable doubt about the qualifications of Mrs. Owensby to express an opinion as an expert on the question of the sanity of defendant. Her function as a psychologist in the Forensic Services Division of Central State Psychiatric Hospital was to preside over the psychological testing of patients admitted for evaluation and aid in the staffing of those patients by preparing a report of psychological evaluation to be included and considered as an integral part of the ultimate psychiatric decisions submitted to the court, as in this case, on the question of whether or not a defendant was competent to stand trial. No doubt the witness is qualified as an expert in the field of psychology to testify in the related areas of her training. There is no evidence in this record to indicate any expertise in the area of mental illness, or qualifications to evaluate the psychiatric reports of

defendant's physicians which were included in his central file records. The very fact that she misconstrued the reports of psychiatrists who had treated and examined defendant to the effect that he had been diagnosed as a manic depressive is indicative of her lack of expertise in the field in which she presumed to testify as an expert.

A statement of the rule followed in this State on the reception of expert testimony is found in McCormick on Evidence, Sec. 13 (1954), as follows:

> "An observer is qualified to testify because he has firsthand knowledge which the jury does not have of the situation or transaction at issue. The expert has something different to contribute. This is a power to draw inferences from the facts which a jury would not be competent to draw. To warrant the use of expert testimony, then, two elements are required. First, the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and second, the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth. The knowledge may in some fields be derived from reading alone, in some from practice alone, or as is more commonly the case, from both."

The determination of a psychologist's competence to render an expert opinion based on his findings as to the presence or absence of mental disease or defect must depend upon the nature and extent of his training and knowledge, and does not depend upon his claim to the title psychologist. That determination, after hearing, must be left in each case to the traditional discretion of the trial court, subject to appellate review. In exercising that discretion the trial judge should make a finding in respect to the individual qualifications of the expert witness.

This was not done by the trial judge in this case before allowing the witness to testify. There is no doubt Mrs. Owensby's testimony was admissible to show the form of psychological tests made of the defendant and the analysis and explanation of such tests. There is no showing in this record that she is qualified academically or by training as a clinical psychologist in a scientific sense to make a diagnosis of the existence and character of a mental disease, and whether there is a cause or relationship between a disease and an unlawful act. In proper circumstances, testimony concerning the results of psychological tests administered to a defendant are admissible as a means of enlightening a jury with respect to the specific information contributed by the psychologist to the overall mass of information ultimately utilized by medically trained psychiatrists in arriving at an expert opinion concerning the medical diagnosis of mental disease or defect. But to say that a psychologist is qualified to give an expert opinion with reference to a medical diagnosis is, in effect, to say that nonmedical witness can render an expert answer to a medical question on the strength of information insufficient to resolve it. Such an opinion is a conclusion by guess work, as far as a valid and proper medical determination is concerned. Unless the results of the tests form the basis for an opinion by a qualified psychiatrist of the mental ability of an individual those results would be irrelevant. Without an expert opinion the jury could only speculate on the mental ability of the defendant, insofar as the expert testimony is concerned.

There is statutory criteria for licensing psychologists and psychological examiners in the State of Tennessee to assist trial courts.

T.C.A. Sec. 63-1106 sets forth the limitations imposed upon a psychological examiner in the practice of his profession to be the application of recognized principles, methods and procedures of the science of professional psychology, such as interviewing or administering and interpreting tests of mental abilities, apti-

tudes, interests and personality characteristics, for such purposes as psychological evaluation or for educational or vocational selection, guidance or placement, and particularly proscribes overall personality appraisal for classification, personality counseling, psychotherapy or personality readjustment techniques as authorized practice only under qualified supervision. The proscribed practice for psychological examiners under T.C.A. Sec. 63-1106 is authorized only for a licensed psychologist. See T.C.A. Sec. 63-1107. The qualifications for licensing as a psychological examiner and psychologist, particularly in the field of clinical psychology, are set forth in T.C.A. Sec. 63-1111 and 63-1112, respectively. Mrs. Owensby is clearly not qualified in the field of clinical psychology under the laws of this State. While she may have been entitled to express an opinion as a lay person, her testimony would be entitled to the same weight as that of any other lay witness where it was given from her personal observation of defendant, which she says was some five or six times during his commitment at Central State Hospital as a patient. Her testimony in this regard must, of necessity, be somewhat diluted because the only time she saw defendant when he was not being prescribed a strong anti-psychotic drug was in a short interview immediately after his admission to the hospital. The opinion or conclusion of a lay witness must be based upon personal observation or knowledge, and not upon hypothetical facts, nor on what he has heard from others, and stress must be laid upon the facts coming under the observations of the witness in order to determine the weight of his testimony. See *Atkins v. State*, 119 Tenn. 458, 105 S.W. 353. While expert testimony is to be received with great caution, *Mullendore v. State*, 183 Tenn. 53, 191 S.W.2d 149, as was correctly charged by the trial judge in this case, a nonexpert witness does not testify from the same standpoint as the expert, and it is for this very reason that he is required to give the facts upon which he bases his conclusions, so that the jury may say whether his conclusions are warranted by the facts, and the opinion of the nonexpert are only valuable and competent to the extent that

they are supported by the facts and circumstances upon which they are predicated. *Wilcox v. State*, 94 Tenn. 106, p. 112, 28 S.W. 312. Nowhere in this record was it developed that the lay witnesses who testified about defendant's mental competence were aware he was under psychiatric treatment for several months prior to the homicide. Nor were the particular facts coming under their observation, and on which their opinions were based, brought to the jury's attention in any fashion in order for the jury to determine whether their conclusions were warranted by the facts, as they applied to the time of the homicide.

Taken as a whole, the competent and admissible evidence in this record points unerringly to defendant's mental incompetence at the time of the homicide. This was a mindless and senseless act which is amply sustained by the proof.

This conclusion is warranted by the very fact of the jury's confusion as indicated by the following colloquy which took place during the course of their deliberations:

> "The Court: The jury indicated they have a question, Mr. Jones?
>
> Deputy Jones: Yes, sir.
>
> The Court: All right, bring them in and let the jury sit there in the jury box.
>
> (Thereupon, the following proceedings were had in the presence and hearing of the jury:)
>
> The Court: Who is the foreman?
>
> (Indication to question was given.)
>
> The Court: Did the jury have some question?
>
> Mr. Torkell: Yes, sir, we did.
>
> The Court: All right, sir.

Mr. Torkell: We would like to determine if a person can be criminally insane at the moment he pulled the trigger on the gun or does it take more time previous to the act or after the act?

The Court: I am not sure. Would you restate that question again for me?

Mr. Torkell: Well, considering all the evidence, up till the moment the defendant pulled the trigger on the pistol could he be considered sane up till that moment and then he didn't know right from wrong when he pulled the trigger?

The Court: That's a question the Court cannot answer for you. That's a decision that the jury has to reach, if possible, under the evidence which you heard and under the instructions that I have given to you. There is no further instruction that the Court could legally give you at this time on that specific part. I am sorry, but I cannot."

The only living witness who testified regarding defendant's conduct and mental condition for any space of time preceding the homicide was his wife. Her testimony was replete with evidence of his mental instability. She spoke of his strange conversations by telephone on the day his sister was killed, some of which she related to her hostess on that occasion. At one point after defendant's sister arrived in their home, she leaped from the porch and warned the sister, "It looks like he may have that gun out." She gave account of an incident of physical abuse toward her in October, 1971, which resulted in a separation and lead to initiation of psychiatric treatment for him as a condition of reconciliation. She felt he needed help and she was unable to cope with him. She recounts that he was prescribed medication in conjunction with his psychiatric counseling, which he stopped taking some time before the shooting. A week before the homicide she had consulted with defendant's psychiatrist about increasing his medication. She described in detail

various irrational acts, and conduct, as well as events in their married life such as her mastectomy, subsequent metastasis, and other crisis of varying degrees conducive to stress, and defendant's emotional response to these situations.

I am of the opinion that the evidence preponderates in favor of defendant's insanity, and I would sustain the first two assignments of error.

/s/ CHARLES H. O'BRIEN
Judge

APPENDIX C

Supreme Court of Tennessee, at Jackson

April Term, 1975

George S. Edwards,
Petitioner,
vs.
State of Tennessee,
Respondent.
No. B-34712

No. 2 Shelby County,
Offense: Murder in the Second Degree
Conviction Is Sustained and Judgment of Court of
Criminal Appeals Is Affirmed

JUDGMENT

Came the petitioner George S. Edwards by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Shelby County; and upon consideration thereof this Court is of opinion that there is no reversible error on the record and that the Conviction is Sustained and the Judgment of the Court of Criminal Appeals is Affirmed, and it is accordingly so ordered and adjudged by this Court.

It is, therefore, ordered and adjudged by this Court that the petitioner, for offense of Murder in the Second Degree be delivered to the Warden of the penitentiary, or his agent, and be by him committed to the penitentiary of the State of Tennessee and there confined at hard labor for a term of not more than Ten (10) Years and not less than Ten (10) years, commencing on the day of his reception at said penitentiary.

The sentence of imprisonment will be credited with the time the petitioner spent in jail pending this appeal. The number of days of such confinement will be certified to the Warden by the Clerk of the Court below.

The Petitioner will pay the costs of the cause accrued in this Court, and in the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Shelby County, directing that Court to proceed with the collection of the costs of the cause accrued therein in the manner provided by law.

The Clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Shelby County, which will be his authority for delivering the petitioner to the Warden or his agent; and also a duly certified copy hereof to the Warden of the penitentiary, who will at once proceed to execute this judgment.

5-17-76

Office of Clerk of the Supreme Court for the Western Division
of the State of Tennessee:

I, Jewel Redden, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the judgment of said Court pronounced at its April Term, 1975 in the case of George S. Edwards vs. State of Tennessee, as the same appears of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office, in Jackson, Tenn., on this the 17th day of May, 1976.

/s/ JEWEL REDDEN
Clerk

cc: Court below
Sheriff
Warden
Cost bill

Felony—Affirmed

In the Supreme Court of Tennessee
At Jackson

George S. Edwards,
Petitioner,
vs.
State of Tennessee,
Respondent.

Docket Number
34,712 C.C.A.

Shelby Criminal, Honorable James C. Beasley, Judge

(Filed May 17, 1976)

For Petitioner:

Lucius E. Burch, Jr., Charles F. Newman, Burch, Porter and Johnson, Memphis, Tennessee.

For Respondent:

Robert H. Roberts, R. A. Ashley, Jr., Attorney General and Reporter, Nashville, Tennessee.

Affirmed

Cooper, C. J.

OPINION

Petitioner, George S. Edwards, was indicted for murder in the first degree for the June 7, 1972, killing of his sister, Elizabeth (Betty) A. Edwards. Petitioner admitted he had shot and killed his sister on the date alleged in the indictment, and interposed the defense of insanity at the time of commission of the act. The jury found petitioner guilty of murder in the second degree and fixed his punishment at ten years in the penitentiary, and sentence was pronounced accordingly. On appeal to the Court of Criminal Appeals, the majority of the court found petitioner's thirty-six assignments of error to be without merit and affirmed the conviction. One member of the Court of Criminal Appeals dissented, he being of the opinion that the evidence preponderated against the jury's finding on the issue of insanity. This court granted certiorari to consider all assignments of error, and particularly to determine whether the evidence preponderated against the jury's verdict.

The record is replete with testimony, both expert and lay, on the issue of insanity. Petitioner was described by friends and relatives who testified as a "loner," somewhat withdrawn and not gregarious. His parents and his wife both testified that after petitioner's return from Vietnam in 1969 he developed peculiarities in his personal traits, and also had a problem with alcohol. His wife testified that when petitioner was drinking his abnormalities were more apparent, and that on one occasion in October, 1971, he was particularly violent toward her, over a relatively small matter, after he had been drinking.

At that time Mrs. Edwards consulted with her minister, separated from petitioner, and agreed to a reconciliation only after petitioner agreed to seek psychiatric help. The minister recommended Dr. Parks Walker of Memphis. Petitioner accepted the recommendation and became a patient of Dr. Walker in October, 1971. The doctor testified that petitioner had a schizophrenic personality and was suffering from schizophrenia. He further testified that petitioner responded to anti-depressant drugs and his condition improved. Petitioner was still under the care of Dr. Walker at the time of the homicide in June, 1972, although petitioner did not see the doctor very often during the spring months of 1972.

Lay testimony showed petitioner's personality quirks became more pronounced during the spring of 1972, particularly after petitioner quit taking his tranquilizers. Both his parents and a business associate testified they were concerned about him. He was withdrawn, sullen, lost initiative and for three weeks prior to the homicide hardly worked at all. During that period he and his wife moved into a new home, which he was also going to use as an office from which to operate his business as a manufacturer's agent. The witnesses stated that during this period of time the petitioner would frequently have a "glassy" stare and a quizzical or smirking expression on his face at inappropriate times. There are instances in the record indicating that petitioner was domineering and authoritative in the home, and on one occasion he forcibly cut his young stepson's "long" hair. However, those who were close to him, including family members, felt that petitioner knew "right from wrong" at all times.

On the day of the homicide, Mrs. Edwards, petitioner's wife, was out of the house from noon until about 10:45 p.m., during the afternoon and evening, and he seemed very angry with her for being away from home all day. At about dinner time the parents of petitioner stopped at petitioner's house and in-

vited petitioner and the two stepchildren of petitioner who were at home that evening to eat with them. The stepchildren accepted and went to the home of the parents of petitioner for dinner and to spend the night. Petitioner, however, declined because he was working on curtains in his new office. Both his parents and several other persons who saw petitioner during the afternoon and evening of the homicide said that he appeared somewhat withdrawn, but he was not hostile. He recognized everyone and no one detected any particular abnormality in his conduct. He had been drinking beer throughout the afternoon, but did not appear to be intoxicated. There is also testimony in the record that his sister, the victim of the homicide, had called him on one occasion during the evening, and was critical of him because of the way he had been treating his wife, particularly when he was drinking.

When petitioner's wife returned home, she found petitioner sitting on the porch with a can of beer in his hand. Mrs. Edwards sat next to him and asked if they could talk. Petitioner responded, "Well, it's all programmed out," and "I will do my talking to you when we get in the house." Shortly thereafter, petitioner's sister drove up, apparently unexpectedly. Mrs. Edwards invited Betty in for a beer. Betty sat down on the steps with Mrs. Edwards and spoke to petitioner, who did not respond. Finally, Betty asked her brother to get her a beer.

Mrs. Edwards testified that when petitioner went into the house, he walked from the kitchen hallway into the bedroom hallway and then back to the front door, and that she noticed he had his right hand behind his back, apparently concealing something. Mrs. Edwards leaped from the porch and said to Betty: "Get up off of the porch. I don't know what he has got in his hand. It looks like he may have that gun out." Betty, apparently not frightened by petitioner's behavior, again asked for her beer. Mrs. Edwards testified that she then watched petitioner walk back into the bedroom hallway and that she

heard the sound of a drawer closing in the bedroom. When defendant returned to the porch with the beer for Betty, he sat down on the steps with her and entered into conversation.

Shortly thereafter, petitioner and his wife entered the house and petitioner shut the door leaving his sister on the porch. Mrs. Edwards let Betty into the house and they went to the bathroom to get an item which Betty had asked to borrow. Petitioner followed and stood blocking the bathroom doorway when his wife attempted to exit. Petitioner then went into the bedroom, and when his wife and sister followed, they found him lying on the bed. Mrs. Edwards testified that petitioner got up from the bed, pulled a pistol out of a bureau drawer and, without saying a word, fired a single shot at his sister. His wife ran from the house, and the petitioner fired two shots at her, narrowly missing her. Mrs. Edwards went to the house of a neighbor and had them summon the police and an ambulance. She also had the neighbors call Dr. Walker.

Immediately after the shooting and before the police arrived on the scene, petitioner called his mother and told her that he had shot his sister and was sorry. When the police arrived, he at first told them that his wife had shot herself. Later, he told the investigating officers that his "sister" had shot herself. He gave a third statement to the officers within fifteen minutes of the killing stating that he had killed his sister because she had sinned too much and that she was better off dead. He further stated that she was scolding him for mistreating his wife and that when he could not take it anymore, he shot her.

Following the homicide, Dr. Walker engaged the services of Dr. Garo Aivazian, Chairman of the Department of Psychiatry at the University of Tennessee Medical School, and they together evaluated the petitioner over the next several months. Both diagnosed petitioner's condition as schizophrenia. Both testified that in their opinion on the date of the shooting the petitioner was insane within the definition of the *M'Naughten*

rule. Both expressed the opinion that petitioner was sane at the time of the trial. Both admitted that there were times when petitioner would know right from wrong. And, on cross-examination, Dr. Aivazian testified that petitioner was not psychotic when he first saw him on June 12, 1972, and also expressed the opinion that petitioner knew what was going on around him during the day of the homicide on June 7, 1972. There was also evidence of a history of mental illness in petitioner's family, going back several generations on both sides. The extent and nature of the illness is not shown other than by lay testimony.

Mrs. Nona Owensby, a licensed psychological examiner employed at Central State Hospital, was called as a rebuttal witness by the state. She testified that based upon her observation of the petitionar and study of his records she was of the opinion that petitioner was not psychotic or mentally deranged at the time of the shooting, and did know right from wrong. She expressed the further opinion that petitioner was feigning mental illness in an effort to avoid criminal responsibility, and testified to observations and conversations with petitioner which led her to this belief.

The petitioner offered in surrebuttal Dr. Fidelholtz, Director of the Forensics Services Division at Central State Hospital. He testified that the petitioner in his opinion was not mentally ill at the time of the trial, but said he had no opinion as to petitioner's mental capacity on the date of the homicide, nor was he aware that any member of his staff, which included Mrs. Owensby, had expressed any such opinion.

Where there is evidence pro and con on the issue of sanity of the person charged with a crime, as there is in this case, the burden is on the state to prove that petitioner had the mental ability to distinguish between right and wrong, and knew the nature and quality of his act at the time of the act and with

respect to the act. Spurlock v. State, 212 Tenn. 832 (1963); Mullendore v. State, 183 Tenn. 53, 191 S.W.2d 149 (1945). This burden can be met by the state through the introduction of expert testimony on the issue, or through lay testimony where a proper foundation for the expressing of an opinion is laid, or through the showing of acts or statements of the petitioner, at or very near the time of the commission of the crime, which are consistent with sanity and inconsistent with insanity. See Brooks v. State, 489 S.W.2d 71 (Tenn. 1972); Wilcox v. State, 94 Tenn. 106, 28 S.W. 312 (1896); Whitmire v. State, 490 S.W. 2d 179 (Tenn. Cr. App. 1972).

Petitioner insists the state failed to carry its burden and that the evidence preponderated against the jury's finding that petitioner was sane at the time of the killing. Implicit in petitioner's argument is the insistence that the testimony of the psychiatrists on this issue must be accepted over lay testimony. Petitioner also stresses the testimony of his wife and family concerning his disturbed mental condition in the days before the killing and the history of mental illness in his family, and the lack of an apparent motive for his actions.

The jury is not required to accept testimony of a psychiatrist on the issue of sanity to the exclusion of lay testimony or to the exclusion of evidence of the actions of the petitioner inconsistent with sanity. If it were, as pointed out in Brooks v. State, *supra*, "[it] would effectively preempt our jury trial system on sanity issues and replace it with a system of trial by psychiatrists' opinions. We are unwilling, even if we had the power, to saddle society with so basic a change in our system of criminal jurisprudence."

In this state, "it is settled beyond question that the weight and value of expert testimony is for the jury and must be received with caution. Mullendore v. State, 183 Tenn. 53, 191 S.W.2d 149. This applies to expert opinions of medical men.

Crane Enamel Co. v. Jamison, 188 Tenn. 211, 217 S.W.2d 945. Where there is any conflict between expert testimony and the testimony as to the facts, the jury is not bound to accept expert testimony in preference to other testimony, and must determine the weight and credibility of each in the light of all the facts shown in case. Act-O-Lane Gas Service Co. v. Clinton, 35 Tenn. App. 442, 245 S.W.2d 795; East Tennessee Natural Gas Co. v. Peltz, 38 Tenn. App. 100, 270 S.W.2d 591. Expert medical opinion regarding the functioning of the human body must be more or less speculative. Patterson Transfer Co. v. Lewis, 195 Tenn. 474, 260 S.W.2d 182; Great American Indemnity Company v. Friddell, 198 Tenn. 360, 280 S.W.2d 908." Sparkman v. State, 496 S.W.2d 692, 696 (1970).

In weighing the testimony of the psychiatrists in this case, the jury was faced with the fact that neither saw the petitioner on the day of the shooting. Dr. Walker saw the petitioner five days before the shooting and did not consider petitioner's mental condition serious enough to require treatment other than the taking of tranquilizers. The next time he saw petitioner was two days after the killing and Dr. Walker testified that petitioner was not psychotic at that time. Dr. Aivazian first saw petitioner five days after the killing and testified that petitioner was not psychotic at that time or at any other time he saw petitioner. On the other hand, lay witnesses who saw petitioner before the shooting testified that petitioner appeared normal and capable of distinguishing between right and wrong. And even more significant than testimony of the lay observers was the fact that before the police arrived on the scene, petitioner telephoned his mother and told her that he had shot Betty and was sorry.

The jury's verdict indicates they found the state carried its burden of showing that petitioner was sane at the time of the homicide. In reviewing this finding to see if it comports with the evidence, we are bound by the rule that the verdict of the jury, approved by the trial judge accredits the testimony of the

witnesses for the state and resolves all conflicts in favor of the theory of the state. McBee v. State, 213 Tenn. 15, 372 S.W. 2d 173 (1963). We have read the record carefully keeping in mind the limits set forth in the *McBee* rule, and have concluded the evidence does not preponderate against the jury's finding that the petitioner, the moment he shot and killed his sister, knew what he was doing and knew right from wrong and that his acts were wrong.

Assignments five and six have to do with the order of proof. The trial court did not require the state to introduce all its evidence on the issue of insanity or part of its proof in chief, but permitted the state to introduce evidence on the issue in rebuttal to the testimony introduced by petitioner. The defense claims that it was seriously prejudiced by this. We find no merit in these assignments. In the first place the order of proof is more or less the accepted order in cases such as this. In the second place the matter lies in the discretion of the trial judge, and no conceivable prejudice to the defense has been demonstrated by reason of the order of proof which was followed. Essary v. State, 210 Tenn. 220, 357 S.W.2d 342 (1962); Nichols v. State, 200 Tenn. 65, 289 S.W.2d 849 (1956).

In assignments twelve and thirteen, petitioner insists that the state should have been required to call Dr. Fidelholtz as its witness or that he should have been called as a court's witness. The trial court can not dictate the witnesses to be called by the state. He does have the power to call a witness as the court's witness, but under the circumstances of this case, it would have been error for him to do so. *See* Montesi v. State, 220 Tenn. 354, 417 S.W.2d 554 (1967). Further, it should be noted that the witness, who testified in surrebutal, was candid and frank in everything he said and was generally favorable to the defense in his testimony. There certainly could be no prejudicial error with regard to the manner in which this witness was called.

In assignment fourteen petitioner insists the trial court erred in allowing lay witnesses to express an opinion on the mental state of the defendant. Petitioner contends there was insufficient foundation laid to qualify these witnesses to express an opinion, and also that the questions asked failed to adequately state the *M'Naghten* rule. On reviewing the record, we find that petitioner did not object either to the form or content of the questions asked lay witnesses, nor did he question the adequacy of the foundation laid to qualify the witnesses to express an opinion on the issue of sanity. But, aside from this failure to object to the testimony, the record fairly shows that the opinions on petitioner's sanity voiced by lay witnesses were based upon their personal knowledge and observation as required by Atkins v. State, 119 Tenn. 458, 105 S.W.2d 353, and Wilcox v. State, 94 Tenn. 106, 28 S.W.2d 312.

There are a number of assignments of error questioning the competency of Mrs. Owensby to give an expert opinion, and her qualifications as an expert witness. There are also assignments to the effect that her testimony involved privileged communications made to her by the petitioner. Interestingly enough, no objection was made by counsel for the petitioner either as to the qualifications of Mrs. Owensby or as to the content of her testimony. Indeed, at one point, counsel conceded that she was qualified and that he had no questions as to her qualifications. In their brief filed in this court, counsel for petitioner have appended newspaper articles and other items tending to show that Mrs. Owensby has since been discredited and has been discharged by the state. The findings of the Grievance Procedure Board of Review Decision reinstating Mrs. Owensby as an employee of Central State Hospital have also been tendered to this court for consideration. Neither of these matters appear in the trial record and, consequently, we cannot take cognizance of them. We would note, however, that most of the testimony of Mrs. Owensby was factual, being based on her observation of petitioner and on statements by petitioner, and would be admissible whether Mrs. Owensby was an expert witness or not.

Throughout the trial, counsel for the petitioner sought to have the trial court give instructions to the jury as to what the legal effect of a finding of not guilty by reason of insanity would be. Specifically they sought to have the court charge the jury from the Tennessee Code as to the statutes on hospitalization of a person found to be mentally ill. Numerous special requests were tendered on this point, as well as repeated requests throughout the trial. The trial court declined to give these instructions, because he felt that it was not the jury's prerogative to be concerned about the legal effect of their verdict, but only to make a finding on the evidence presented to them. This action of the trial judge has been assigned as error.

Authorities in other states on this point are conflicting. In some states by statute the trial judge is required to instruct the jury as to the effect of a verdict of not guily by reason of insanity. We do not have such a statute, however, and Tennessee law generally is to the effect that the trial judge is not supposed to tell the jury what the legal effect of their verdict is. See Harbison v. Briggs Brothers Paint Manufacturing Company, 209 Tenn. 534, 354 S.W.2d 464 (1962). It is not relevant to the issue of petitioner's guilt or innocence. And, as pointed out by the trial judge in colloquy with counsel, there were so many options and alternatives available, depending upon the mental condition of the accused, it would be highly conjectural and would involve the jury in speculation as to what might happen to the accused. Counsel for the defendant did, in their final arguments, strongly suggest that the accused would not be released outright, but that he would be hospitalized if found not guilty by reason of insanity. Then too, the statutory provision for commitment of persons found not guilty by reason of insanity, T.C.A. 33-709, is not a mandatory provision. It simply provides that the District Attorney may initiate judicial hospitalization procedures under T.C.A. 33-603 or 604 and that the court may order the defendant found not

guilty by reason of insanity hospitalized upon the certification of two licensed physicians that the defendant is substantially likely to injure himself or others. And, in view of the fact that petitioner relied on the defense of insanity at the time of the offense with which he was charged, and the further fact that all evidence is to the effect that *he is now competent*, no prejudice could result to petitioner by the refusal of the trial court to instruct the jury as requested in this case.

Petitioner also contends the trial court erred in refusing to permit counsel, on voir dire, "to go into the meaning and effect of a verdict of not guilty by reason of insanity." We agree with the Court of Criminal Appeals that "the purpose of voir dire is stated in the case of Smith v. State, 205 Tenn. 502, 327 S.W.2d 308, and the trial court did not abuse his discretion in controlling the extent of the voir dire examination."

There is an assignment of error, Number eleven, with regard to the final argument of the District Attorney General. It is claimed that the District Attorney inferred that the accused would go free if found not guilty by reason of insanity. While this is a possible inference from the argument, the remarks were actually directed at the state's theory that the accused was simulating mental illness in order to escape punishment. Further, no objection was made to the argument, and defense had the opportunity to and did reply to the argument. Under these circumstances, we see no prejudicial error in the argument of the District Attorney General.

Numerous special requests for jury instructions were tendered to the trial court and were refused. Each of the requests is the subject of an assignment of error. With the exception of those pertaining to the legal effect of a verdict of not guilty by reason of insanity, which has been heretofore mentioned, all of the special requests were adequately covered in the general charge given by the trial judge to the jury. It is not error to re-

fuse a special request where the charge as given fully and fairly states the applicable law. Bostick v. State, 210 Tenn. 620, 360 S.W.2d 472 (1962).

Assignments of error twenty-seven through twenty-nine and assignments thirty-one and thirty-two involve the trial court's instructions to the jury. The Court of Criminal Appeals discussed each of these assignments in the majority opinion and concluded that the charge was without material error. No attempt was made in the brief filed in behalf of petitioner to show specifically where the Court of Criminal Appeals was in error in its conclusion. Despite this, we have considered the assignments anew and find ourselves in full agreement with the Court of Criminal Appeals that the charge given by the trial court was complete and accurate.

We also agree with the Court of Criminal Appeals that the trial court acted properly in considering a question asked by a juror, on the jury's return to the courtroom during deliberation. "A juror asked the court a question dealing with insanity, and the court refused to answer, saying instead that it was a question for the jury to determine from the instructions and the evidence. This was not error, because in view of the complete instructions on insanity already given, any additional instruction would have served only to confuse the jury or unfairly emphasize a certain point of law. Furthermore, since the court did not give any instruction, he was at liberty to make an oral response, without reducing it to writing."

Supplemental briefs have been filed on behalf of petitioner, asserting that the trial court was in error in the method of selecting the grand jury and the trial jury in that there had been a systematic exclusion of women from the jurys. This matter was mentioned briefly in the motion for a new trial, but there is no evidentiary record upon which systematic exclusion of women could be found. We do not have any record at all with

regard to the method of the selection of the grand jurors, and the voir dire selection of the jurors in the present case contains no exceptions or objections with regard to the exclusion of women. There being no factual basis for this assignment, it must be overruled.

Petitioner's conviction is sustained, and the opinion of the Court of Criminal Appeals is affirmed.

s ROBERT E. COOPER
Chief Justice

Concur:
Harbison, J.
Dyer, Special Justice

Dissent:
Henry, J.
Fones, J.

In the Supreme Court of Tennessee
at Jackson

George S. Edwards, Petitioner, vs. State of Tennessee, Respondent.		Shelby Criminal

DISSENTING OPINION

(Filed May 17, 1976)

Henry, J.

I cannot conscientiously concur in the conclusions reached by my colleagues.

I

In the totality of the facts and circumstances of this tragic case, I am impelled to the view that this demented and tormented defendant was not legally responsible for his acts at the time he shot and killed his sister. I reach this conclusion on the basis of the State's proof which I regard as being conclusive on the matter. Had a motion for an acquittal been made at the conclusion of the State's proof in chief it would have been well grounded. The proof offered by the defendant merely served to bolster that which the State had already established beyond a reasonable doubt and to a moral certainty by the massive weight of its own proof.

Before proceeding to an analysis of the State's proof and a documentation of the foregoing conclusions it should be pointed out that a substantial portion of the prosecution's proof came from members of a family torn by tragedy and demoralized by domestic difficulties. It must be analyzed in that light.

It should also be borne in mind that prior to the trial all concerned had certain knowledge that the sole issue would be insanity at the time of the offense. The record shows that on 8 December 1972, a hearing was conducted on defendant's request for a bond. At this hearing the court heard testimony from Dr. G. H. Aivazian, Chairman of the Department of Psychiatry at the University of Tennessee Medical College. He testified that defendant suffered from schizo-affected schizophrenia, a very serious mental malady requiring continuous observation and treatment. The State's attorney represented to the court that he had talked with defendant's wife and she was apprehensive that, if released, he would harm her, or the children, or even his own parents. Viewed from any angle this constituted an admission by the State that defendant was not of sound mind.

Pursuant to this hearing he was released on bond but upon the condition that he not leave the Shelby County Jail until admitted to a suitable hospital for treatment and not leave the hospital without leave of the court. An order was entered to that effect. Thus defendant's insanity became the *prima facie* law of the case. The State with this obvious knowledge, from its first witness forward, anticipated the defense and sought to rebut the presumption of insanity. This distinguishes this case from the normal prosecution wherein there is no pre-judgment of the issue of sanity.

It should further be pointed out that this case was tried in the context of the ancient and archaic *M'Naghten Rule*:[1]

> [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as *not to know the nature and quality of the act* he was doing; or, if he did know it, that he did not know he was doing what was wrong. (Emphasis supplied).
>
> 8 Eng.Rep. at 722

Tennessee follows the M'Naghten Rule. *Spurlock v. State*, 212 Tenn. 132, 368 S.W.2d 299 (1962).

It is important, as we analyze the proof, to recognize, and keep firmly in mind that the rule is in the conjunctive, and notwithstanding cases which short-cut the rule and put it on the basis of knowing right from wrong only, the rule requires the all important additional element of knowledge of the *nature and quality* of the act. This distinction was blurred throughout the trial of this criminal action. Moreover, the majority opinion ignores this critical element of *M'Naghten*.

It should further be borne in mind that the testimony of lay witnesses must be based on "facts and acts", but "their conclu-

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[1] M'Naghten's Case, 1 C. & K., 130; 10 Cl. & F. 200, 8 Eng. Rep. 718 (H.L.1843).

sion from these facts does not necessarily create an issue or prevent the Court from finding the true condition as a matter of law." *Hammond v. Union Planters Nat. Bank*, 189 Tenn. 93, 105, 222 S.W.2d 377, 382 (1949). The expression of an opinion, absent facts, is not evidence. *Melody v. Hamblin, et al*, 21 Tenn.App. 687, 115 S.W. 237 (1937).

With these preliminary statements of applicable legal principles in mind, we proceed to an analysis of the State's testimony.

II

The State first called the defendant's wife. She unfolded the story of defendant's gradual but progressive deterioration over a two-year period. She painted a picture of a man who was a "loner", whose personality was characterized by insecurity, hostility and resentment. During the latter part of 1971, after a series of bizarre incidents, she consulted with the minister of the church she and defendant attended with regularity. He advised that defendant seek psychiatric care. Subsequently she conditioned the continuation of their marital relationship upon his doing so.

Accordingly he was first seen by Dr. Parks Walker, a practicing psychiatrist, in November 1971, some seven months before this tragedy. Dr. Walker prescribed medication designed to elevate his spirits from the moods and depressions from which he suffered. Several weeks before the tragedy, defendant, without medical advice, stopped taking the medication.

The events leading up to the consultations with Dr. Walker were indeed bizarre. His wife had a mastectomy in May 1971. There was subsequently a recurrence and her prognosis is poor. This distressed him and he began to talk of suicide and to talk generally about death.

While he apparently was worried to the point of distraction over his wife's condition, simultaneously he seemed determined to agitate her and keep her in a state of mental turmoil. He would alternate between being kind or solicitous and cruel or sadistic. He seemed to take pleasure in tormenting his children.

While his wife, who emerges in this record as an anguished but strong and gracious lady, was gallantly trying to live but bravely facing the virtual certainty of her eminent death, he bought a cemetery lot, forced her to go see where he proposed to bury her, and chattered incessantly on the details of her funeral.

Some time after she returned from the hospital there was a horrible scene in her bedroom one night after she had changed into night clothing. He cursed and abused her, broke an ash tray, broke his eye glasses, broke part of the facing off one of the doors and damaged the bannister on the stairway. Then came an incident so vile and repulsive as to be foreign to the conduct of any *sane* person. He took his hand and scratched the scar area on the breast upon which she had had the mastectomy, and then grabbed the other breast, brusing it and telling her that she did not deserve to have that one. She testified that he was in "a wild state."

It was following this incident that she imposed as a condition of reconciliation that he seek psychiatric care.

As aforesaid he discontinued taking his medication about three weeks before the tragedy.

For three or four months before the tragedy he had "a very strange smile . . . at very inappropriate times . . . a very silly kind of grin"; at times he had "a mad state" and "one eye would get larger than the other." In the two or three weeks immediately preceding the tragedy he was in a state of deep depression, neglected his work, withdrew completely from his

family, and did nothing but eat and sleep. His wife testified that he was "completely out of touch with reality" and "he did rather seem to be in another world."

When she was next door immediately following the shooting, she told her neighbor, "that man is crazy." The first person she called was her husband's psychiatrist.

Notwithstanding this proof positive of mental derangement, she testified, by affirmative response to counsel's questions, that he appeared to know what he was doing and to know the difference between right and wrong. I would reject these conclusions since they are wholly and utterly inconsistent with and repugnant to her entire testimony. Moreover, she did not testify to the first part of the M'Naghten equation, i.e., knowledge of the "nature and quality" of his acts.

Her testimony may not fairly be equated with any conclusion except mental derangement and abnormality amounting to insanity.

The State next called six policemen whose cumulative testimony further cemented the proof of insanity. Upon their arrival he told them, "My wife shot herself." This notwithstanding the fact that the body of his dead sister, Betty, was in plain view. Next he told one of the officers that his sister shot herself. Next he signed a statement admitting that he shot his sister "because she sinned too much." Enroute to the police department, he said he did not know who shot his sister. All this within a span of approximately thirty minutes.

As to his appearance, one or more said that his eyes were dilated and glassy and he was almost at the point of crying. One said he did not seem upset and he appeared to know what was going on; another said he showed no remorse, didn't seem upset and "seemed like he was kind of proud of what he had done; seemed sort of happy about it; sort of sick grin." One of them

said he "had kind of a small grin on his face; kind of seemed like he was happy."

Next the State called Phyllis Worthy, sister of defendant's wife. Without reciting any facts or circumstances, she testified that he appeared normal on the afternoon of the tragedy.

Then Michael Richardson, husband of Mrs. Edwards' sister testified. By affirmative response he testified that on the afternoon of the tragedy defendant knew the nature and quality of his acts and had the ability to tell the difference between right and wrong. He too observed the "silly grin" as defendant sat in the squad car after the killing.

Mrs. Michael Richardson testified by affirmative response that during all the years she knew him he knew right from wrong.

Neither of the Richardsons detailed "facts and acts" upon which they based their opinion.

The State's final, and we think conclusive, proof of insanity came from Mrs. Ben Edwards, mother of the defendant.

This tortured and tormented lady, required by the State to testify as a witness against her son for the murder of her daughter, unfolded a story of human misery.

She established that this defendant's ancestors and relatives on both sides of his family, had been plagued by mental instability. On his mother's side, an uncle died while a patient at Western State Hospital. One of his first cousins suffered from paranoid schizophrenia and spent a year in a sanitarium in Dallas. Another suffered from the same malady. His mother was unstable and at one time had had a drinking problem. She had attempted suicide on two occasions.

His father's grandmother had died at Whitfield, the Mississippi Insane Asylum. His great uncle died while a mental pa-

tient at the Veterans' Administration Hospital at Murfreesboro. His grandfather had undergone mental treatment at Wallace Sanitarium in Memphis. His father also had a drinking problem at one time.

It is a matter of common experience and universal knowledge that insanity tends to run in families.[2]

This deeply troubled mother told of her son's return from Vietnam and how his personality began to degenerate and how his condition grew progressively worse. She told of how extremely close defendant and his sister, Betty, had always been.

She told of his telephone call to her on the night of the murder and of hearing him say:

> Mama, I am sorry. I have just shot Betty.

She told of going by to see him on the late afternoon of the tragedy. She had become increasingly concerned over his condition. He had progressively become more withdrawn and depressed. She says that he looked very strange, very withdrawn and had a glassy stare.

And yet she testified by affirmative response to questions, that he appeared to know what he was doing, was conscious of his actions and appeared to know the difference between right and wrong.

This was her testimony, but it was not based on "facts and acts." These affirmative responses were *non-sequiturs* since the tone and tenor of her whole testimony was to the contrary.

This concludes the State's proof.

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[2] See, e.g., B.Maloy, Nervous and Mental Diseases 443 (1935); G. Smoot, The Law of Insanity 73 (1929). In subsequent testimony, Dr. Parks Walker stated that a predisposition to schizophrenia is or can be hereditary.

In view of the defendant's plea, the statements of counsel on voir dire, and the admission by counsel for defendant in open court that defendant shot his sister,[3] the whole viable and triable issue was the sanity of the defendant. The State could have relied upon the presumption of sanity, and made out its case solely by the police officers with no allusion to defendant's sanity. Instead, and for reasons I cannot fathom, the State elected to raise the issue and, through its witnesses, sought to establish that defendant was sane.

This trial strategy boomeranged. Instead of establishing sanity, the totality of the State's proof established insanity beyond any reasonable doubt.

III

Since defendant's proof was merely cumulative it would serve no useful purpose to comment on it in great detail.

Defendant's father told of the steady decline in defendant's career, his loss of interest in his job, the loss of part of his marketing territory, the mounting depression from which he suffered, and complete withdrawal from his family and friends; and of his own deep concern over his son's condiiton.

The Vice-President for Sales and Marketing of the Company for which defendant worked, elaborated on the deterioration of his job performance and of coming to Memphis to see about him.

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[3] At an early stage of the trial, counsel for the defendant stated, in open court, and in the presence of the jury:

> The identity of George Edwards is not in dispute. The fact that he did shoot his sister is not in dispute. The corpus delicti is established. The offense did occur in Shelby County and within the jurisdiction of the Court, and the weapon that has been exhibited is the weapon that was used. So we don't have to prove any of that.

Two ministers testified and told of his condition. One of them had seen him the day before the tragedy and he was withdrawn, anxious, tense, had a "beady" stare and a "smirk" or "funny" smile. The other had referred him to a psychiatrist.

Doctor Parks Walker, a Memphis Psychiatrist, described defendant as being introverted, hypersensitive, inhibited, seclusive, withdrawn and as having a paranoid type personality with all the major symptoms of schizophrenia. Among other things he stated:

> [S]chizophrenia is a major mental disorder where a person has a loss of good contact with reality, where his judgment becomes impaired and where his behavior may be such that legally he would engage himself in what might be called insane behavior.

Initially he treated him with Navane, a major tranquilizer used primarily for people with psychotic conditions. Subsequently he treated him with other anti-depressants.

Doctor Walker prescribed four (4) major symptoms of schizophrenia:

1) Ambivalence (e.g., love and hate)
2) Disturbance in expression or emotions (silly grin)
3) Failure to show emotions (e.g., blank stare, glassy look)
4) Disturbance of thought processes (e.g., chain of thought, allusions, hallucinations, paranoid thinking)[4]

Doctor Walker further testified that it was typical of schizophrenia that it would flare up and subside, or come and go.

He last saw defendant on May 31, 1972, one week before the tragedy. At this time, he had discontinued the use of his

[4] The State proved conclusively that he had all these symptoms.

medication, was deeply depressed, had stopped work, and was lying around the house in a morose and deeply disturbed state. The doctor put him back on medication and advised him to return in two weeks and that, if he was not better he would be hospitalized.

He further testified that at the time of the killing the defendant was laboring under such a defect of reasoning from disease of mind as not to know the nature and quality of his act, or if he did know it, that he did not know what he was doing was wrong.

Defendant next called Dr. Garo H. Aivazian, a Diplomate of the American Board of Psychiatry and Neurology in Psychiatry, a Fellow of the American Psychiatric Association and Chairman of the Department of Psychiatry at the UT Medical College in Memphis.

Doctor Aivazian saw him on June 12, 1972, five days after the murder and treated him through August 14, 1972.

He diagnosed his condition as schizophrenia. He testified:

> My opinion is that at the time of the shooting (defendant) was psychotic to a degree whereby his ability to recognize what was around him as the environment and to test the environment and its realities was impaired to a degree whereby he was not capable of deciding between right or wrong and was not capable of adhering to any decision because he could not decide between right and wrong.

IV

The State, over the vigorous and repeated objection of the defense, called Nona Owensby, a psychological examiner, or tester, to testify to the mental capacity of the defendant, at the time of the murder.

Permitting her to testify, as a rebuttal witness, was prejudicial error. The court, in its discretion, permitted her to testify after observing that "this evidence would have been and possibly should have been submitted to the State in its proof in chief." In the peculiar posture of this case with the State going forward with the proof on the issue of sanity, to permit it to hold back a portion of its proof, was both unfair and prejudicial. Her testimony was not rebuttal in any sense. She rebutted nothing. Her testimony was simply a continuation of the State's proof in chief. We cannot brush this aside, as does the majority opinion, by chanting the old cliche that this "lies in the discretion of the trial judge" and asserting that "the order of proof is more or less the accepted order in cases such as this." I agree with these general propositions but they apply in a case wherein the normal procedure is followed, i.e., a case wherein the State proves the murder, the defendant offers evidence of insanity and the State counters with rebuttal proof designed to show sanity.[5] But this case did not fit into this conconvential pattern. The majority asserts that "no conceivable prejudice to the defense has been demonstrated." Any lawyer who has ever announced "ready" in a criminal case knows that this was an unmitigated disaster. *Inter alia* it permitted the case to go to the jury with the testimony fresh on its minds from an unqualified "expert" who misstated her qualifications (see *infra*) with no reasonable opportunity to rebut.

After giving her name, the first words she uttered were false:

> I am *the psychologist* at the Forensic Services Division of Central State Psychiatric Hospital. (Emphasis supplied.)

After the trial of this lawsuit, in a commendable and lawyer-like display of candor and forthrightness, Honorable Robert H.

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[5] The State is not bound to establish defendant's sanity but if its proof, or the proof of defendant raises a reasonable doubt the burden of proof shifts to the State. *Covey v. State*, 504 S.W.2d 387 (Tenn.Crim.App.1973).

Roberts, the distinguished Advocate General, addressed a letter to counsel for the defendant in which he advised:

> General Ashley and I have discussed this case and have concluded that we have a *responsibility to the Court to advise them concerning the misrepresentation of qualifications by Mrs. Nona Owensby* at the trial, and would suggest that even though *the material you have filed in that regard is de hors the record, that the Court, because of the unusual circumstances, should consider it.* If you have no objection, I would like to make that announcement to the Court prior to your opening argument on the merits. (Emphasis supplied.)

Among the "material" filed was a news story of an investigation of certain personnel at Central State Hospital wherein Nona Owensby is quoted as admitting that she had been "sloppy" in her use of the term "psychologist."

The Findings of the Investigative Committee were also filed. *Inter alia* the Committee found:

1. That she exceeded her authority in testifying before courts regarding matters of probation, parole, suspension of sentence, leniency, and insanity.

* * * * * * *

4. That she flagrantly exceeded the authority of her license as a Psychological Examiner.

5. That she failed or refused to pursue clarification of the extent of her licensed authority when brought to her attention and continued her activities.

6. That she furnished courts, attorneys for patients and district attorneys with "Qualifications as an Expert Witness" containing information that was inaccurate and

misleading, inferring that her professional education and capabilities exceeded those actually possessed.

* * * * * * * *

10. That she held herself out to be a psychologist by using her "working title" as an indication of professional qualifications tending to mislead courts before whom she gave testimony, attorneys representing patients, district attorneys, patients, and staff at FSD.

Section 63-1105 T.C.A. recognizes two (2) levels of psychological practice, viz: "(a) 'psychological examiner' and (b) 'psychologist' ".

Section 63-1106 T.C.A. defines the "practice of psychological examiner" and provides as follows:

> A person practices as a "psychological examiner" within the meaning of this chapter when he holds himself to be a psychological examiner and/or renders to individuals or to the public for remuneration any service involving the application of recognized principles, methods and procedures of the science and profession of psychology, such as interviewing or administering and interpreting tests of mental abilities, aptitudes, interests and personality characteristics, for such purposes as psychological evaluation or for educational or vocational selection, guidance or placement. The psychological examiner practices the following only under qualified supervision; over-all personality appraisal or classification, personality counseling, psychotherapy or personality readjustment techniques.

The ensuing section defines the "practice of psychologist Section 63-1111 states the qualifications of a psychological examiner and the next section those of a psychologist. Clearly, Nona Owensby is not a psychologist, and does not have the requisite educational qualifications. The majority opinion so treating her is in error.

This, of course, does not preclude her from testifying but she does so only as a *layman*, albeit a well-informed one. But when she represents to a jury that she is a *psychologist*, it materially and adversely affects their evaluation of her testimony.

Irrespective of her qualifications or the lack thereof, her testimony is suspect in substantial particulars.

1. She had never seen defendant until after the murder and did not possess the requisite professional qualifications to make an evaluation on the basis of reports and information which she had.

2. Dr. Jacob Norman Fidelholtz, is the head of the Forensic Services Division at Central State Hospital. Nona Owensby is a member of his staff. He testified in substance that neither he nor any of his staff had formed or expressed any opinion as to defendant's sanity at the time of the murder.

3. She made no notes of any interviews with defendant and was unable even to give the date of a single interview.

4. Defendant was being treated with major tranquilizers during his stay at Central State and, therefore, was under the influence of them during each interview.

5. Dr. Fidelholtz testified that Drs. Walker and Aivazian were in a substantially better position to diagnose defendant's condition than was he.

6. She was under the erroneous impression that one of the psychiatrists who testified in this case had diagnosed defendant's disorder as being manic-depressive, an entirely different type mental disorder.

7. The examination at Central State was designed to determine present sanity and not that at the time of the murder.

I cannot conclude from a careful study of the record that her testimony was worthy of credible acceptation. I reject it.

It is my opinion, after a concentrated study of the record in this case, that the evidence massively preponderates in favor of a finding that George Edwards, on June 7, 1972 was "laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong." If George Edwards was sane on the date of the killing, he was guilty of a brutal murder and should have been found guilty of murder in the first degree. The jury obviously accepted his plea of insanity but refused to bring in a not guilty verdict. (See *infra*).

I am fully cognizant of the rule of *McBee v. State*, 213 Tenn. 15, 372 S.W.2d 173 (1963), and, therefore, agree that the verdict of the jury, approved by the trial judge, accredits the testimony of the theory of the State. There were no conflicts, and I accept the testimony of all the witnesses at full value (except Owensby) and in so doing "accredit the testimony" of the State's witnesses. The fair import of the collective testimony of the State in chief validates the plea of insanity. If we follow *McBee* we should reverse.

The State's case, in the last analysis, must stand or fall upon the testimony of Nona Owensby. *McBee* does not require that we accept testimony when she knowingly deceived the jury as to her qualifications. Critical to the jury's acceptation of her testimony was the belief that she was *the psychologist at the Forensic Division*. We cannot accredit that which we know was based, substantial part, on false testimony.

Our task on appellate review is to determine that the State carried its heavy burden of proving sanity beyond a reasonable doubt. If the evidence is evenly balanced, or in equipoise, there

is reasonable doubt and defendant must be acquitted. *King v. State*, 91 Tenn. 617, 648, 20 S.W. 169 (1892); *Doye v. State*, 50 Tenn. 348 (1871); *Covey v. State, supra*.

V

I would sustain the first three assignments, reverse and remand for a new trial.

I am not content with the *M'Naghten Rule*. I regard it as being at variance with current medical theories of mental illness. The assessment of mental capacity should be left to those trained in the behavioral sciences. The concept of "right and wrong" is essentially moral and ethical and operates to force witnesses (lay and expert), juries, and judges to make moral rather than medical, social and legal judgments. It is the present policy of our law that "[u]ntil a definitely superior rule of law" comes into being we will "trudge along the now well-traveled pike blazed more than a century ago by *M'Naghten*." *Spurlock v. State, supra*, at 140. While I do not agree to trudge along with *M'Naghten*, I recognize that such is not an issue in this controversy.

There is a glaring deficiency in Tennessee statutory law as it relates to the disposition of criminal defendants found not guilty by reason of insanity. All will agree that a criminal defendant, acquitted by a jury, should not be released to return to society, and, I think all will agree that confinement in a penal institution is inappropriate restraint for the mentally ill. Our law gives the jury no alternative. Either it sends a mentally ill defendant to the penitentiary or it releases him upon society. Given this choice societal instincts of preservation demand confinement in the penitentiary.

The Law Revision Commission came to grips with this problem. §40-2321, of its proposed criminal code, provides that in

certain designated cases (including homicide), if a defendant is found guilty by reason of insanity:

> [T]he Court shall order him to be committed to the custody of the Commissioner of Mental Health to be placed in an appropriate institution for custody, care and treatment.

The Commission's comment under this proposed section reads, in pertinent part, as follows:

> *Tennessee is now the only state not having statutory procedures for the treatment of criminal defendants acquitted on the defense of insanity.* The resulting uncertainty as to the disposition of the incompetent offender has resulted in an *unreasonable* resistance to the proper use of the insanity defense in this state. (Emphasis supplied)

This proposed Code provision now pends before the Legislature. The adoption of some procedure for proper disposition in such cases is a matter of urgent public concern. Tennessee desperately needs some mechanism for providing the public with protection and simultaneously insuring that the unfortunate victims of mental disease are dealt with in a humane manner. Their restoration to useful and productive citizenship is a matter of compelling state interest.

Trial and appellate judges and jurors labor under the difficulty arising from the State's failure to act in this area of vital public concern. Twelve jurors and nine judges have now considered George Edwards' case. I am persuaded that if they had a choice each of these twenty-one Tennesseans would say without a moment's hesitation that he should be placed in a mental institution for care and treatment. I believe all would agree that sending him to the penitentiary would be inhumane. Time was when the lame, the halt, the physical misfits and the mentally diseased were thrown over a cliff because they were a threat to the security of the group. George Edwards is such an outcast.

We are throwing him over the cliff because there is a void in our law.

I am convinced that this defect in our law accounts for this conviction and, while I deplore a result that releases him from all restraint, this is the legal result to which I am impelled.

This lawsuit was ably and vigorously tried by skillful prosecutors and astute defenders. The trial judge presided with meticulous fairness and in a completely judicious manner. The comments I have made are not intended to be critical of their actions. Quite to the contrary, I applaud all of them and regard this as a model trial from a standpoint of trial decorum.

I am authorized to state that Justice Fones concurs in this dissent.

/s/ HENRY
HENRY, J.

APPENDIX D

In the Supreme Court of Tennessee
at Jackson

George S. Edwards,
Petitioner,

vs.

State of Tennessee,
Respondent.

Shelby Criminal Docket Number 34,712 C.C.A.

OPINION ON PETITION TO REHEAR

(Filed July 19, 1976)

George S. Edwards has filed a petition to rehear insisting that the court "overlooked determinative facts in two areas of crucial importance," in affirming the conviction of Mr. Edwards for second degree murder. Specifically, petitioner questions the view of the majority of the court of "the Owensby testimony," and assignments questioning the trial court's instructions to the jury. The argument advanced in support of the petition is essentially the same argument made to and considered by the court in rendering its opinion in this case; however, out of deference to counsel, we have reconsidered the issues. On doing so, we adhere to the conclusions stated in the original petition filed in this case.

The petition to rehear is overruled.

/s/ ROBERT E. COOPER
Chief Justice

Concur:
Harbison, J.
Dyer, Sp. J.

Dissent:
Fones, J.
Henry, J.

APPENDIX E

In the Criminal Court of Shelby County, Tennessee

State of Tennessee
vs.
George S. Edwards
No. 34,712.

DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT OR FOR NEW TRIAL

(Filed March 22, 1973)

The defendant, George S. Edwards, moves that he be granted a judgment of not guilty by reason of insanity, notwithstanding the verdict, or in the alternative that he be granted a new trial, upon the following grounds:

1. That the verdict was contrary to law and against the preponderance of the evidence.

2. That under the evidence there was, as a matter of law, a reasonable doubt as to the guilt of the defendant.

3. That the Court erred in refusing to grant the defendant's motion for a directed verdict.

4. That the Court erred in refusing to allow the defendant's attorney, during *voir dire* to go into the subject of the meaning and effect of a verdict of not guilty by reason of insanity.

5. That the Court erred in refusing to require the State to offer its expert proof upon the question of the defendant's mental condition as a part of its proof in chief.

6. That the Court erred in allowing the State, over the defendant's objection, to offer its expert witness, Mrs. Owensby, in rebuttal.

7. That the Court erred in allowing Mrs. Owensby to testify, over the defendant's objection, to statements made to her by the defendant. This was error because the alleged statements referred to the meaning and effect of a verdict of not guilty by reason of insanity, because the alleged statements were privileged communications, because at the time when they were made the defendant was in custody, in an authoritarian, coercive environment, he was under the influence of drugs, he was not advised of his rights or given the warnings to which he was entitled under the Constitution, and he could not be held to have intelligently and voluntarily waived his rights. This violated the defendant's rights under the United States Constitution and under TCA Supp. Section 40-2441.

8. That the Court erred in allowing Mrs. Owensby to testify, over the defendant's objection, as to the meaning and effect of a verdict of not guilty by reason of insanity.

9. That the Court erred in allowing Mrs. Owensby to testify, over the defendant's objection, as to the statements and opinions of third persons regarding the mental condition of the defendant.

10. That the Court erred in allowing Mrs. Owensby to testify, over the defendant's objection, to her opinion as to the mental condition of the defendant, because that opinion was based upon statements and opinions of third parties.

11. That the Court erred in allowing the State's attorney to state and imply in his argument to the jury that the defendant would not be subject to confinement upon a verdict of not guilty by reason of insanity, but would be set free.

12. That the Court erred in refusing to require that the State call Dr. Fidelholtz as a State's witness.

13. That the Court erred in refusing to call Dr. Fidelholtz as a Court's witness.

14. That the Court erred in allowing lay witnesses to express their opinions as to the ultimate issues in the case.

15. That the Court erred in allowing lay witnesses to express the opinions which they did express because there was insufficient foundation laid to qualify these witnesses to express the opinions and to support the opinions expressed.

16. That the Court erred in refusing to instruct the jury as to the meaning and effect of a verdict of not guilty by reason of insanity.

17. That the Court erred in refusing to grant the defendant's Special Request No. 15, as follows:*

---

* Please see the note in the Memorandum which will be filed in support of this Motion regarding the numbering of the defendant's Special Requests.

> "I charge you that, if you find that the defendant, at the time of shooting his sister, was legally insane, and therefore return a verdict of not guilty by reason of insanity, Tennessee law provides a procedure by which the defendant may be committed to a state mental hospital, if the Court finds that the individual is mentally ill and (1) because of his mental illness he is likely to injure himself or others if he is not hospitalized, or (2) is in need of custody, care or treatment in a mental hospital and, because of his illness, lacks sufficient thought or capacity to make responsible decisions with respect to his hospitalization. Within thirty (30) days after the admission of the defendant into the hospital, the superintendent of the hospital is required to certify to the Court whether or not the conditions which required his hospitalization still exist. If so, the defendant will be detained in the hospital and the superintendent is required to cause him to be examined as

often as practicable, but not less often than every six (6) months. The Court may at any time, on the basis of reports to the Court by the superintendent and such further inquiry as the Court considers appropriate, order indeterminate hospitalization or dismissal. The order of hospitalization shall state whether the defendant shall be detained for an indeterminate or for a temporary period and, if for a temporary period, then for how long."

This was error because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury.

18. That the Court erred in refusing to grant the defendant's Special Request No. 5, as follows:

"I charge you that, if you find that the defendant, at the time of shooting his sister, was legally insane, and therefore return a verdict of not guilty by reason of insanity, Tennessee law provides a procedure by which the defendant may be committed to a state mental hospital for custody, care, and treatment. The period of such treatment is a matter for the Court and the superintendent of the state mental hospital."

This was error because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury.

19. That the Court erred in refusing to grant defendant's Special Request No. 4, as follows:

"I charge you that, if you find that the defendant, at the time of shooting his sister, was legally insane, and therefore return a verdict of not guilty by reason of insanity, Tennessee law provides a procedure for requiring that the defendant receive such hospitalization, care, and treatment

as may be deemed necessary by the Court and the superintendent of the state mental hospital."

This was error because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury.

20. That the Court erred in refusing to grant defendant's Special Request No. 2, as follows:

"I charge you that, in determining whether the defendant is guilty or not guilty by reason of insanity, you should consider only the defendant's state of mind at the time of the act, and you should not consider or concern yourself with the consequences of your verdict. The consequences of the verdict and the treatment and care of the defendant after the verdict is a matter for the Court to handle under the law of the State of Tennessee."

This was error because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury.

21. That the Court erred in refusing to grant defendant's Special Request No. 1, as follows:

"I charge you that, if you find that the defendant, at the time of shooting his sister, was legally insane, and therefore return a verdict of not guilty by reason of insanity, the subsequent treatment of the defendant is a matter for the Court and for the appropriate officials of the state mental hospital."

This was error because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury.

22. That the Court erred in refusing to grant the defendant's Special Request No. 13, as follows:

"I charge you that, under the evidence, the greatest offense of which you may find the defendant guilty is voluntary manslaughter."

This was error because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury.

23. That the Court erred in refusing to grant the defendant's Special Request No. 8, as follows:

"It is not necessary that a person be deprived of all reason, so as to be incapable of purpose and intention, to reduce his offense to manslaughter."

This was error because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury.

24. That the Court erred in refusing to grant the defendant's Special Request No. 11, as follows:

"I charge you that the statutory definition of manslaughter is:

'the unlawful killing of another without malice, either express or implied, which may either be voluntary upon a sudden heat, or involuntary, but in the commission of some unlawful act."

This was error because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury.

25. That the Court erred in refusing to grant the defendant's Special Request No. 12, as follows:

"I charge you that involuntary manslaughter is a killing without the intent to inflict the injury and that voluntary manslaughter is a killing which is done in passion but with

concurring will and intent to inflict the injury which produces the death."

This was error because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury.

26. That the Court erred in refusing to grant the defendant's Special Request No. 14, as follows:

"A person who kills another as the result of an insane delusion is not acting with malice."

This was error because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury.

27. That the Court erred in its charge to the jury in that it failed to instruct the jury properly as to the State's burden of proving beyond a reasonable doubt that the defendant was legally sane at the time of the act and as to the meaning of that burden.

28. That the Court erred in its charge to the jury in that it failed to instruct the jury properly as to the application of the so-called M'Naghten Rule, in that the Court several times stated that portion of the M'Naghten Rule relating to the ability to distinguish right from wrong without stating that portion of the Rule relating to knowledge of the nature and quality of that act.

29. That the Court's instructions to the jury with respect to expert witnesses were in error. The sole issues in this case were issues requiring the testimony of experts and the full consideration thereof by the jury and the instructions encouraged the jury to disregard such testimony.

30. That the Court erred in failing to charge the jury that the jury should view the opinions expressed by lay witnesses with

respect to the ultimate issues in the case with at least the same degree of caution and skepticism with which the Court instructed the jury to view the testimony of the expert witnesses.

31. That the Court erred in charging the jury to determine whether the presumption of sanity had been overcome or remained in the case at the end of the proof, since by that time the presumption of sanity had as a matter of law been overcome and the State was as a matter of law clearly under the burden of proving beyond a reasonable doubt that the defendant was not legally insane at the time of the act and with respect to the act.

32. That the Court in its charge to the jury failed to give sufficient emphasis to the fact that the only real issue in the case was whether, at the very time of the shooting and with respect to that particular act, the defendant was legally insane and did not know the nature and quality of that act or, if he did know its nature and quality, did not know that it was wrong. The charge, by giving undue attention and emphasis to matters which would not be at issue in the case if the plea of insanity were good, matters which were not in fact contested by the defendant at the trial, indicated to the jury that the Court did not believe that a verdict of not guilty by reason of insanity should be returned.

33. That the Court erred in refusing to give to the jury an additional written charge and in failing to re-read all or relevant portions of the charge in response to the question asked by the jury after the jury had retired.

34. That the Court erred in giving to the jury the oral comment and instruction which it did give in response to the question asked by the jury after the jury had retired, in violation of TCA Section 40-2516.

35. That the method by which the Grand Jury and the Trial Jury were selected systematically and effectively eliminated

females from the Grand Jury and the Trial Jury, in violation of the defendant's rights under the Constitution of the United States.

36. That the errors set forth above, and each of them, deprived the defendant of his rights under the United States Constitution, including without limitation his rights under the Fourteenth, Sixth, Fifth and Fourth Amendments thereto.

/s/ LUCIUS E. BURCH, JR.
LUCIUS E. BURCH, JR.
/s/ CHARLES F. NEWMAN
CHARLES F. NEWMAN

Certificate of Service

I, Charles F. Newman, do hereby certify that I have mailed a copy of the foregoing Defendant's Motion for Judgment Notwithstanding Verdict or for New Trial to Mr. Ewell Richardson, Assistant Attorney General, at his office, 157 Poplar Avenue, Memphis, Tennessee 38103, this 22nd day of March, 1973.

/s/ CHARLES F. NEWMAN
CHARLES F. NEWMAN

APPENDIX F

In the Court of Criminal Appeals of Tennessee
at Jackson*

George S. Edwards,
Plaintiff in Error,
vs.
State of Tennessee,
Defendant in Error.
} Shelby Criminal No. 34712

BRIEF OF PLAINTIFF IN ERROR

Lucius E. Burch, Jr., and
Charles F. Newman
Burch, Porter & Johnson
130 North Court Avenue
Memphis, Tennessee 38103
Attorneys for Plaintiff in Error

Assignments of Error

1. The verdict of the jury was contrary to law and against the preponderance of the evidence. This was erroneous and prejudiced the rights of the plaintiff in error because there are numerous decisions holding that, under circumstances similar to those presented by the instant case, the Court must set aside the verdict of the jury and either make a judgment of not guilty by reason of insanity or order a new trial.

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* Note: We have included in this Appendix only that portion of this Brief which sets forth the Errors assigned.

2. Under the evidence there was, as a matter of law, a reasonable doubt as to the guilt of the plaintiff in error. The judgment was therefore erroneous and prejudiced the rights of the plaintiff in error for the reasons set forth in 1, above.

3. The Court erred in refusing to grant the plaintiff in error's motion for directed verdict. (T., 672). This was erroneous and prejudiced the rights of the plaintiff in error for the reasons set forth in 1, above.

4. The Court erred in refusing to allow the plaintiff in error's attorney, during *voir dire*, to go into the subject of the meaning and effect of a verdict of not guilty by reason of insanity. (T., 3-10; 12-28; 30). This was erroneous and prejudiced the rights of the plaintiff in error in that it denied to the plaintiff in error his right to choose a jury which would decide his case upon the basis of the applicable law and which would not feel constrained to reject his plea of not guilty by reason of insanity upon the basis of ignorance or confusion as to the meaning and consequences of a verdict of not guilty by reason of insanity.

5. The Court erred in refusing to require the State to offer its expert proof upon the question of the plaintiff in error's mental condition as a part of its proof in chief. (T., 315-328; 565-8; 569-593; 594-605; 652-8). See testimony of Mrs. Owensby, attached hereto as Exhibit A, and testimony of Dr. Fidelholtz, attached hereto as Exhibit B. This was erroneous and prejudiced the rights of the plaintiff in error because the State had full notice and knowledge, well before the commencement of the trial, that the only real issue in the case was whether the plaintiff in error was legally sane or insane at the time of the offense; the State clearly had the burden, prior to the conclusion of its proof in chief, of proving that the plaintiff in error was sane at the time of the act and it had theb urden of proving this beyond a reasonable doubt; and by allowing the State to offer its expert proof upon the question of the plaintiff in error's mental condition as rebuttal evidence, after the completion of

the plaintiff in error's evidence, the Court gave to the State a very considerable advantage over the plaintiff in error upon this very crucial issue.

6. The Court erred in allowing the State, over the plaintiff in error's objection, to offer its expert witness, Mrs. Owensby, in rebuttal. (T., 315-328; 565-8; 569-593; 594-605; 652-8.) This was erroneous and prejudiced the rights of the plaintiff in error for the reasons set forth in 5, above. The testimony of Mrs. Owensby is attached hereto as Exhibit A.

7. The Court erred in allowing Mrs. Owensby to testify, over the plaintiff in error's objection, to the statements made to her by the plaintiff in error. (T., 596; 624-628; 630-7; 644-5). This testimony is included in Exhibit A, attached hereto. This was erroneous and prejudiced the rights of the plaintiff in error because the alleged statements referred to the meaning and effect of a verdict of not guilty by reason of insanity, because the alleged statements were privileged communications, because at the time when they were made the plaintiff in error had been indicted and was in custody, in an authoritarian, coercive environment, he was under the influence of drugs, he was not advised of his rights or given the warnings to which he was entitled under the Constitution, and he could not be held to have intelligently and voluntarily waived his rights. This violated the plaintiff in error's rights under the United States Constitution and under TCA Supp. Section 40-2441. See also in this connection 8, immediately below.

8. The Court erred in allowing Mrs. Owensby to testify, over the plaintiff in error's objection, as to the meaning and effect of a verdict of not guilty by reason of insanity. (T., 607 ff; esp. 607, 618-620; 625-8; 635-6; 644-5). This was erroneous and prejudiced the rights of the plaintiff in error because, under the circumstances (including especially the Court's refusal to allow the plaintiff in error's attorney, during *voir dire*, to go into

the subject, as set forth in 4, above, and the Court's refusal to give appropriate instructions to the jury, as set forth in 16, 17, 18, 19, 20, and 21, below, and because of the error set forth in 11, below), this testimony tended to influence the jury to disregard the applicable law and to reject the plaintiff in error's plea of not guilty by reason of insanity upon improper bases, including the fear that the plaintiff in error would be set free and not be given the proper supervision and control if such a verdict were rendered. This testimony is included in Exhibit A, attached hereto.

9. The Court erred in allowing Mrs. Owensby to testify, over the plaintiff in error's objections, as to the statements and opinions of third persons regarding the mental condition of the plaintiff in error. (T., 596-601; 606-621; 625-630; 630-640). This testimony is included in Exhibit A, attached hereto. This was erroneous and prejudiced the rights of the plaintiff in error because it was in contravention of the plaintiff in error's right to confront and cross-examine witnesses and his right to due process under the United States Constitution and was in violation of the so-called "Hearsay Rule."

10. The Court erred in allowing Mrs. Owensby to testify, over the plaintiff in error's objection, to her opinion as to the mental condition of the plaintiff in error, because her opinion was based upon statements and opinions of third parties. (T., 596-601; 606-621; 625-630; 630-640). This testimony is contained in Exhibit A, attached hereto. This was erroneous and prejudiced the rights of the plaintiff in error for the reasons set forth in 9, above.

11. The Court erred in allowing the State's attorney to state and imply in his argument to the jury that the plaintiff in error would not be subject to confinement upon the verdict of not guilty by reason of insanity, but would be set free. See T., 705-708, where Mr. Patterson said:

"But he knew the possibilities of how he could avoid any punishment whatsoever.

* * * * * * * *

"But if you find him guilty, that means confinement, gentlemen. He doesn't particularly care for this. I don't blame him. I think that is a normal assumption there. I am not trying to be facetious. That is a kind of a normal reaction, to avoid the inevitable.

"Don't become confused, gentlemen. Mr. Edwards would not be on trial here today for his liberty if he was presently insane. He is sane, gentlemen. Mr. Edwards today sitting before you is sane, and, accordinging to their own defense of Dr. Aivazian, he was sane five or seven days after the commission of this act. Don't be fooled by this plea of insanity. Don't let George Edwards fool you in his plea of insanity, gentlemen. Look to the facts. That's where you are to render your decision."

See also the remainder of Mr. Patterson's remarks in this connection which are quoted below at pages 72-74. This was error for the reasons set forth in 4 and 8, above.

12. The Court erred in refusing to require that the State call Dr. Fidelholtz as a State's witness. (T., 652-8; 315-328; 565-8; 569-593; 594-605). The testimony of Dr. Fidelholtz is attached hereto as Exhibit B. This was erroneous and prejudiced the rights of the plaintiff in error for the reasons set forth in 5, above. By allowing the State to call Mrs. Owensby as a rebuttal witness and by refusing to require that the State call Dr. Fidelholtz as a State's witness, and by refusing to call Dr. Fidelholtz as a Court's witness as set forth in 13, below, the Court forced the plaintiff in error to call Dr. Fidelholtz as his witness in surrebuttal, which was unfair and prejudicial to the rights of the plaintiff in error.

13. The Court erred in refusing to call Dr. Fidelholtz as a Court's witness. (T., 652-8; 315-328; 565-8; 569-593; 594-605). The testimony of Dr. Fidelholtz is attached hereto as Exhibit B. This was erroneous and prejudiced the rights of the plaintiff in error for the reasons set forth in 12, above.

14. The Court erred in allowing lay witnesses to express their opinions as to the ultimate issues in the case. (T., 101, line 20; 102, line 5; 224, line 18; 225, line 10; 230, line 20; 231, line 6; and 240, lines 18-24). For example, Mrs. Ellen Edwards was allowed to testify as follows:

"Q. Now, before you saw him on the night that his sister was killed, did he at that time appear to know what he was doing?

"A. Yes, he did.

"Q. And appeared to know the difference between right and wrong?

"A. Yes, he did.

"Q. He was conscious of his actions?

"A. He seemed to be. It was very deliberate, seemingly."

And Mrs. Phyllis Worthy was allowed to testify:

"Q. During the period of time that you were with Mr. Edwards there on June 7, 1972, did he give any indication to you about anything being wrong with him?

"A. No.

"Q. Did he appear to be normal to you?

"A. Perfectly.

"Q. Did he have any problem talking to you while you were there?

"A. No. He was very nice and polite and——

"Q. Was there anything about him that gave you the impression that he did not know what was going on around him?

"A. No.

"Q. At the time that you saw him somewhere between 8:00 and 8:30 P. M. on June 7 of 1972, do you have an opinion as to whether or not he knew right from wrong?

"A. Oh, I am sure he did."

Mr. Michael Richardson was allowed to testify:

"Q. At the time that you saw him on the 7th of June, did he appear at that time to know the nature and the quality of his acts and have the ability to tell the difference between right and wrong?

"A. You mean that night?

"Q. Yes.

"A. The afternoon I was there, I would say so.

"Q. And was that the same condition that you generally knew him during the years that you knew him, that he knew the difference between right and wrong?

"A. Uh-huh, yes, sir."

And Mrs. Richardson was allowed to testify:

"Q. On that occasion on June 7, 1972, did he appear to be normal in every way?

"A. Yes, sir.

"Q. During the years that you had known him, did he appear to know what he was doing and the nature and quality of his acts and what was right and wrong?

"A. Yes, sir. Yes, sir."

This was erroneous and prejudiced the rights of the plaintiff in error because, under the circumstances (including the Court's errors in charging the jury with respect to expert and lay testimony, as set forth in 29 and 30, below) it tended to encourage the jury to disregard the expert testimony and to reject the plaintiff in error's plea of not guilty by reason of insanity upon the basis of uninformed lay speculation. See also 29, below. Also, these questions to the lay witnesses do not state the M'Naghten Rule accurately.

15. The Court erred in allowing lay witnesses to express the opinions which they did express because there was insufficient foundation for the proof to qualify these witnesses to express the opinions expressed and to support the opinions expressed. See testimony quoted in 14, above. This was erroneous and prejudiced the rights of the plaintiff in error for the reasons set forth in 14, above.

16. The Court erred in refusing to instruct the jury as to the meaning and effect of a verdict of not guilty by reason of insanity. (T., 6c-10; 12-28; 30; 745-8; 800; 803; 806-807). This was erroneous and prejudiced the rights of the plaintiff in error for the reasons set forth in 4 and 8, above.

17. The Court erred in refusing to grant the plaintiff in error's Special Request No. 15, as follows:

"I charge you that, if you find that the defendant, at the time of shooting his sister, was legally insane, and therefore return a verdict of not guilty by reason of insanity, Tennessee law provides a procedure by which the defendant may be committed to a state mental hospital, if the Court finds that the individual is mentally ill and (1) because of his mental illness he is likely to injure himself or others if he is not hospitalized, or (2) is in need of custody, care or treatment in a mental hospital and, because of his illness, lacks sufficient thought or ca-

pacity to make responsible decisions with respect to his hospitalization. Within thirty (30) days after the admission of the defendant into the hospital, the superintendent of the hospital is required to certify to the Court whether or not the conditions which required his hospitalization still exist. If so, the defendant will be detained in the hospital and the superintendent is required to cause him to be examined as often as practicable, but not less often than every six (6) months. The Court may at any time, on the basis of reports to the Court by the superintendent and such further inquiry as the Court considers appropriate, order indeterminate hospitalization or dismissal. The order of hospitalization shall state whether the defendant shall be detained for an indeterminate or for a temporary period and, if for a temporary period, then for how long."

T., 836.

This was erroneous and prejudiced the rights of the plaintiff in error because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury and for the reasons set forth in 4 and 8, above.

18. The Court erred in refusing to grant the plaintiff in error's Special Request No. 5, as follows:

"I charge you that, if you find that the defendant, at the time of shooting his sister, was legally insane, and therefore return a verdict of not guilty by reason of insanity, Tennessee law provides a procedure by which the fendant may be committed to a state mental hospital for custory, care, and treatment. The period of such treatment is a matter for the Court and the superintendent of the state mental hospital."

T., 826.

This was erroneous and prejudiced the rights of the plaintiff in error because the Special Request correctly stated the law

and was not set out in the Court's general charge to the jury and for the reasons set forth in 4 and 8, above.

19. The Court erred in refusing to grant plaintiff in error's Special Request No. 4, as follows:

"I charge you that, if you find that the defendant, at the time of shooting his sister, was legally insane, and therefore return a verdict of not guilty by reason of insanity, Tennessee law provides a procedure for requiring that the defendant receive such hospitalization, care, and treatment as may be deemed necessary by the Court and the superintendent of the state mental hospital."

T., 825.

This was erroneous and prejudiced the rights of the plaintiff in error because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury and for the reasons set forth in 4 and 8, above.

20. That the Court erred in refusing to grant plaintiff in error's Special Request No. 2, as follows:

"I charge you that, in determining whether the defendant is guilty or not guilty by reason of insanity, you should consider only the defendant's state of mind at the time of the act, and you should not consider or concern yourself with the consequences of your verdict. The consequences of the verdict and the treatment and care of the defendant after the verdict is a matter for the Court to handle under the laws of the State of Tennessee."

T., 823.

This was erroneous and prejudiced the rights of the plaintiff in error because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury and for the reasons set forth in 4 and 8, above.

21. The Court erred in refusing to grant plaintiff in error's Special Request No. 1, as follows:

> "I charge you that, if you find that the defendant, at the time of shooting his sister, was legally insane, and therefore return a verdict of not guilty by reason of insanity, the subsequent treatment of the defendant is a matter for the Court and for the appropriate officials of the state mental hospital."
>
> T., 822.

This was erroneous and prejudiced the rights of the plaintiff in error because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury and for the reasons set forth in 4 and 8, above.

22. The Court erred in refusing to grant the plaintiff in error's Special Request No. 13, as follows:

> "I charge you that, under the evidence, the greatest offense of which you may find the defendant guilty is voluntary manslaughter."
>
> T., 834.

This was erroneous and prejudiced the rights of the plaintiff in error because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury.

23. The Court erred in refusing to grant the plaintiff in error's Special Request No. 8, as follows:

> "It is not necessary that a person be deprived of all reason, so as to be incapable of purpose and intention, to reduce his offense to manslaughter."
>
> T., 829.

This was erroneous and prejudiced the rights of the plaintiff in error because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury.

24. The Court erred in refusing to grant the plaintiff in error's Special Request No. 11, as follows:

> "I charge you that the statutory definition of manslaughter is:
>
> 'the unlawful killing of another without malice, either express or implied, which may either be voluntary upon a sudden heat, or involuntary, but in the commission of some unlawful act.' "
>
> T., 832.

This was erroneous and prejudiced the rights of the plaintiff in error because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury.

25. The Court erred in refusing to grant the plaintiff in error's Special Request No. 12, as follows:

> "I charge you that involuntary manslaughter is a killing without the intent to inflict the injury and that voluntary manslaughter is a killing which is done in passion but with concurring will and intent to inflict the injury which produces the death."
>
> T., 833.

This was erroneous and prejudiced the rights of the plaintiff in error because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury.

26. The Court erred in refusing to grant the plaintiff in error's Special Request No. 14, as follows:

> "A person who kills another as the result of an insane delusion is not acting with malice."
>
> T., 835.

This was erroneous and prejudiced the rights of the plaintiff in error because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury.

27. The Court erred in its charge to the jury in that it failed to instruct the jury properly as to the State's burden of proving beyond a reasonable doubt that the plaintiff in error was legally sane at the time of the act and as to the meaning of that burden. (T., 811, 817-821). The Court's charge in this respect is quoted fully below in this Brief, at pages 132-138. This was erroneous and prejudiced the rights of the plaintiff in error in that it failed to explain adequately to the jury the application of the reasonable doubt standard to the insanity defense and therefore denied the plaintiff in error a decision by the jury under the correct legal standards.

28. The Court erred in its charge to the jury in that it failed to instruct the jury properly as to the application of the so-called M'Naghten Rule and the Court several times stated that portion of the M'Naghten Rule relating to the ability to distinguish right from wrong without stating that portion of the Rule relating to the knowledge of the nature and quality of the act. (T., 817-818). The Court's charge in this respect is quoted in full below in this Brief at pages 132-138. This was erroneous and prejudiced the rights of the plaintiff in error in that it denied the plaintiff in error a decision by the jury under the correct legal standards.

29. The Court's instructions to the jury with respect to expert witnesses were in error. (T., 814). The Court's instructions in this regard were as follows:

> "The jurors are the sole judges of the facts. Expert witnesses have been allowed to testify as to certain matters of issue in this case and to state their opinions. With reference to this testimony, which you should consider and judge along with all the other proof, the Court charges you that it should be received with caution. While this kind of testimony is sometimes the only means or the best way to reach the truth, yet it is largely a field of speculation, beset with pitfalls and uncertainties, and requires patience and intelligent consideration to reach the truth. You should give it the same consideration as all the other proof, governed by the same rules to arrive at the truth as you are governed by in your consideration of all the proof."

This was erroneous and prejudiced the rights of the plaintiff in error in that if denied the plaintiff in error a decision by the jury under the correct legal standards and because the sole issues in this case were issues requiring the testimony of experts and the full consideration thereof by the jury and the instructions encouraged the jury to disregard such testimony, and for the reasons set forth in 14, above.

30. The Court erred in failing to charge the jury that the jury should view the opinions expressed by lay witnesses with respect to the ultimate issues in the case with at least the same degree of caution and skepticism with which the Court instructed the jury to view the testimony of expert witnesses. (T., 814). The Court's instructions in this regard are set forth in 29, above. This was erroneous and prejudiced the rights of the plaintiff in error for the reasons which are set forth in 14 and 29, above.

31. The Court erred in charging the jury to determine whether the presumption of sanity had been overcome or remained in the case at the end of the proof, since by that time the presumption of sanity had as a matter of law been overcome and the State was as a matter of law clearly under the burden of proving beyond a reasonable doubt that the plaintiff in error was not legally sane at the time of the act and with respect to the act. (T., 561-5; 579-80; 605; 817). The Court's charge in this respect was as follows:

> "The Court instructs you that if there is sufficient evidence introduced in this hearing on behalf of the defendant to overcome the presumption of sanity and to raise in your minds a reasonable doubt as to whether the

defendant was able to distinguish right from wrong and know his act was wrong at the time of the commission of the alleged offense, then the burden is upon the state to show, by evidence of sanity, beyond a reasonable doubt, that . . ."

(T., 817).

This was erroneous and prejudiced the rights of the plaintiff in error in that it denied the plaintiff in error a decision by the jury under the correct legal standards.

32. The Court in its charge to the jury failed to give sufficient emphasis to the fact that the only real issue in the case was whether, at the very time of the shooting and with respect to that particular act, the plaintiff in error was legally insane and did not know the nature and quality of that act or, if he did know its nature and quality, did not know that it was wrong. The relevant charges are set forth below at pages 132 ff of this Brief. This was erroneous and prejudiced the rights of the plaintiff in error because the charge, by giving undue attention and emphasis to matters which would not be at issue in the case if a plea of insanity were good, matters which were not in fact contested by the plaintiff in error at the trial, indicated to the jury that the Court did not believe that a verdict of not guilty by reason of insanity should be returned and improperly influenced the jury to return a verdict of guilty.

33. The Court erred in refusing to give to the jury an additional written charge and in failing to re-read all or relevant portsions of the charge in response to questions asked by the jury after the jury had retired. (T., Vol. VII, 2-6; 9-19). This was erroneous and prejudiced the rights of the defendant because it denied to the plaintiff in error his right to have the jury fully advised by the Court with respect to the applicable law.

34. The Court erred in giving to the jury the oral comment and instruction which it did give in response to the question asked by the jury after the jury had retired, in violation of TCA § 40-2515. (T., Vol. VII, 2-6; 9-19). This was erroneous and prejudiced the rights of the plaintiff in error for the reasons set forth in 33, above, and because it was in violation of TCA § 40-2516.

35. The Court erred in failing to grant the plaintiff in error's Motion for Judgment Notwithstanding the Verdict or For New Trial. (T., Vol. I, 29-37, 57).

36. The errors committed by the Court as set forth above, and each of them, deprived the plaintiff in error of his rights under the United States Constitution, including without limitation his rights under the Fourteenth, Sixth, Fifth, and Fourth Amendments thereto.

APPENDIX G

In the Supreme Court of Tennessee
at Jackson

George S. Edwards,
Petitioner,

vs.

State of Tennessee,
Defendant.

Shelby Criminal
No. 34,712

PETITION FOR A WRIT OF CERTIORARI TO THE TENNESSEE COURT OF CRIMINAL APPEALS AT JACKSON, ASSIGNMENT OF ERRORS, AND BRIEF IN SUPPORT THEREOF

Lucious E. Burch, Jr., and
Charles F. Newman
Burch, Porter & Johnson
130 North Court Avenue
Memphis, Tennessee 38103
Attorneys for Petitioner

Errors

1. The verdict of the jury was contrary to law and against the preponderance of the evidence. This was erroneous and prejudiced the rights of the petitioner because there are numerous decisions holding that, under circumstances similar to those presented by the instant case, the Courts must set aside the

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[Note: We have included in this Appendix on that portion of this Petition for Certiorari which sets forth the Errors assigned.]

verdict of the jury and either enter a judgment of not guilty by reason of insanity or order a new trial.

2. Under the evidence there was, as a matter of law, a reasonable doubt as to the guilt of the petitioner. The judgment was therefore erroneous and prejudiced the rights of the petitioner for the reasons set forth in 1, above.

3. The Trial Court erred in refusing to grant the petitioner's motion for directed verdict. (T., 672). This was erroneous and prejudiced the rights of the petitioner for the reasons set forth in 1, above.

4. The Trial Court erred in refusing to allow the petitioner's attorney, during voir dire, to go into the subject of the meaning and effect of a verdict of not guilty by reason of insanity. (T., 3-10, 12-28, 30). This was erroneous and prejudiced the rights of the petitioner in that it denied to the petitioner his right to choose a jury which would decide his case upon the basis of the applicable law and which would not feel constrained to reject his plea of not guilty by reason of insanity upon the basis of ignorance or confusion as to the meaning and consequences of a verdict of not guilty by reason of insanity.

5. The Trial Court erred in refusing to require the State to offer all of its evidence upon the question of the petitioner's mental condition as a part of its proof in chief. (T., 315-328; 565-8; 569-593; 594-605; 652-8). See testimony of Mrs. Owensby, attached hereto as Exhibit A, and testimony of Dr. Fidelholtz, attached hereto as Exhibit B. This was erroneous and prejudiced the rights of the petitioner because the State had full notice and knowledge, well before the commencement of the trial, that the only real issue in the case was whether the petitioner was legally sane or insane at the time of the offense; The State clearly had the burden, prior to the conclusion of its proof in chief, of proving that the petitioner was sane at the

time of the act and it had the burden of proving this beyond a reasonable doubt; and by allowing the State to offer this allegedly "expert" proof upon the question of the petitioner's mental conditions as rebuttal evidence, after the completion of the petitioner's evidence, the Court gave to the State a very considerable advantage over the petitioner upon this very crucial issue.

6. The Trial Court erred in allowing the State, over the petitioner's objection, to offer its witness, Mrs. Owensby, as an "expert" witness and in allowing her to testify in rebuttal. (T., 315-328; 565-8; 569-593; 594-605; 652-8). This was erroneous and prejudiced the rights of the petitioner because Mrs. Owensby was not qualified to testify as an "expert" witness and for the reasons set forth in 5, above. The testimony of Mrs. Owensby is attached hereto as Exhibit A. See also Exhibit C and Collective Exhibit D. And see Judge O'Brien's Dissent from the decision of the Court of Criminal Appeals.

7. The Trial Court erred in allowing Mrs. Owensby to testify, over the petitioner's objection, to the statements made to her by the petitioner. (T., 596; 624-628; 630-7; 644-5). This testimony is included in Exhibit A, attached hereto. This was erroneous and prejudiced the rights of the petitioner because the alleged statements referred to the meaning and effect of a verdict of not guilty by reason of insanity, because the alleged statements were privileged communications, because at the time when they were made the petitioner had been indicted and was in custody, in an authoritarian, coercive environment, he was under the influence of drugs, he was not advised of his rights or given the warnings to which he was entitled under the Constitution, and he could not be held to have intelligently and voluntarily waived his rights. This violated the petitioner's rights under the United States Constitution and under TCA Supp. Section 40-2441. See also in this connection 8, immediately below.

8. The Trial Court erred in allowing Mrs. Owensby to testify, over the petitioner's objection, as to the meaning and effect of a verdict of not guilty by reason of insanity. (T., 607 ff; esp. 607, 618-620; 625-8; 635-6; 644-5). This was erroneous and prejudiced the rights of the petitioner because, under the circumstances (including especially the Court's refusal to allow the petitioner's attorney, during *voir dire*, to go into the subject, as set forth in 4, above, and the Court's refusal to give appropriate instructions to the jury, as set forth in 16, 17, 18, 19, 20, and 21, below, and because of the error set forth in 11, below), this testimony tended to influence the jury to disregard the applicable law and to reject the petitioner's plea of not guilty by reason of insanity upon improper bases, including the fear that the petitioner would be set free and not be given the proper supervision and control if such a verdict were rendered. This testimony is included in Exhibit A, attached hereto.

9. The Trial Court erred in allowing Mrs. Owensby to testify, over the petitioner's objections, as to the statements and opinions of third persons regarding the mental condition of the petitioner. (T., 596-601; 606-621; 625-630; 630-640). This testimony is included in Exhibit A, attached hereto. This was erroneous and prejudiced the rights of the petitioner because it was in contravention of the petitioner's right to confront and cross-examine witnesses and his right to due process under the United States Constitution and was in violation of the so-called "Hearsay Rule".

10. The Trial Court erred in allowing Mrs. Owensby to testify, over the petitioner's objection, to her opinion as to the mental condition of the petitioner, because her opinion was based upon statements and opinions of third parties. (T., 596-601; 606-621; 625-630; 630-640). This testimony is contained in Exhibit A, attached hereto. This was erroneous and prejudiced the rights of the petitioner for the reasons set forth in 9, above.

11. The Trial Court erred in allowing the State's attorney to state and imply in his argument to the jury that the petitioner would not be subject to confinement upon the verdict of not guilty by reason of insanity, but would be set free. See T., 705-708, where Mr. Patterson said:

> "But he knew the possibilities of how he could avoid any punishment whatsoever.
>
> * * * * * * * *
>
> "But if you find him guilty, that means confinement gentlemen. He doesn't particularly care for this. I don't blame him. I think that is a normal assumption there. I am not trying to be facetious. That is a kind of a normal reaction, to avoid the inevitable.
>
> "Don't become confused, gentlemen. Mr. Edwards would not be on trial here today for his liberty if he was presently insane. He is sane, gentlemen. Mr. Edwards today sitting before you is sane, and, according to their own defense of Dr. Aivazian, he was sane five or seven days after the commission of this act. Don't be fooled by this plea of insanity. Don't let George Edwards fool you in his plea of insanity, gentlemen. Look to the facts. That's where you are to render your decision."

See also the remainder of Mr. Patterson's remarks in this connection which are quoted below at pages 72-74. This was error for the reasons set forth in 4 and 8, above.

12. The Court erred in refusing to require that the State call Dr. Fidelholtz as a State's witness. (T., 652-8; 315-328; 565-8; 569-593; 594-605). The testimony of Dr. Fidelholtz is attached hereto as Exhibit B. This was erroneous and prejudiced the rights of the petitioner for the reasons set forth in 5, above. By allowing the State to call Mrs. Owensby as a rebuttal witness and by refusing to require that the State call Dr. Fidelholtz as

a State's witness, and by refusing to call Dr. Fidelholtz as a Court's witness as set forth in 13, below, the Court forced the petitioner to call Dr. Fidelholtz as his witness in surrebuttal, which was unfair and prejudicial to the rights of the petitioner.

13. The Trial Court erred in refusing to call Dr. Fidelholtz as a Court's witness. (T., 652-8; 315-328; 565-8; 569-593; 594-605). The testimony of Dr. Fidelholtz is attached hereto as Exhibit B. This was erroneous and prejudiced the rights of the petitioner for the reasons set forth in 12, above.

14. The Trial Court erred in allowing lay witnesses to express their opinions as to the ultimate issues in the case. (T., 101, line 20; 102, line 5; 224, line 18; 225, line 10; 230, line 20; 231, line 6; and 240, lines 18-24). For example, Mrs. Ellen Edwards was allowed to testify as follows:

> "Q. Now, before you saw him on the night that his sister was killed, did he at that time appear to know what he was doing?
>
> "A. Yes, he did.
>
> "Q. And appeared to know the difference between right and wrong?
>
> "A. Yes, he did.
>
> "Q. He was conscious of his actions?
>
> "A. He seemed to be. It was very deliberate, seemingly."

And Mrs. Phyllis Worthy was allowed to testify:

> "Q. During the period of time that you were with Mr. Edwards there on June 7, 1972, did he give any indication to you about anything being wrong with him?
>
> "A. No.
>
> "Q. Did he appear to be normal to you?
>
> "A. Perfectly.

"Q. Did he have any problem talking to you while you were there?

"A. No. He was very nice and polite and——

"Q. Was there anything about him that gave you the impression that he did not know what was going on around him?

"A. No.

"Q. At the time that you saw him somewhere between 8:00 and 8:30 P.M. on June 7 of 1972, do you have an opinion as to whether or not he knew right from wrong?

"A. Oh, I am sure he did."

Mr. Michael Richardson was allowed to testify:

"Q. At the time that you saw him on the 7th of June, did he appear at that time to know the nature and the quality of his acts and have the ability to tell the difference between right and wrong?

"A. You mean that night?

"Q. Yes.

"A. The afternoon I was there, I would say so.

"Q. And was that the same condition that you generally knew him during the years that you knew him, that he knew the difference between right and wrong?

"A. Uh-huh, yes, sir."

And Mrs. Richardson was allowed to testify:

"Q. On that occasion on June 7, 1972, did he appear to be normal in every way?

"A. Yes, sir.

"Q. During the years that you had known him, did he appear to know what he was doing and the nature and quality of his acts and what was right and wrong?

"A. Yes, sir. Yes, sir."

This was erroneous and prejudiced the rights of the petitioner because, under the circumstances (including the Court's errors in charging the jury with respect to expert and lay testimony, as set forth in 29 and 30, below) it tended to encourage the jury to disregard the expert testimony and to reject the petitioner's plea of not guilty by reason of insanity upon the basis of uninformed lay speculation. See also 29, below. Also, these questions to the lay witnesses do not state the M'Naghten Rule accurately.

15. The Trial Court erred in allowing lay witnesses to express the opinions which they did express because there was insufficient foundation in the proof to qualify these witnesses to express the opinions expressed and to support the opinions expressed. See testimony quoted in 14, above. This was erroneous and prejudiced the rights of the petitioner for the reasons set forth in 14, above.

16. The Trial Court erred in refusing to instruct the jury as to the meaning and effect of a verdict of not guilty by reason of insanity. (T., 6c-10; 12-28; 30; 745-8; 803; 806-807). This was erroneous and prejudiced the rights of the petitioner for the reasons set forth in 4 and 8, above.

17. The Trial Court erred in refusing to grant the petitioner's Special Request No. 15, as follows:

"I charge you that, if you find that the defendant, at the time of shooting his sister, was legally insane, and therefore return a verdict of not guilty by reason of insanity, Tennessee law provides a procedure by which the defend-

ant may be committed to a state mental hospital, if the Court finds that the individual is mentally ill and (1) because of his mental illness he is likely to injure himself or others if he is not hospitalized, or (2) is in need of custody, care or treatment in a mental hospital and, because of his illness, lacks sufficient thought or capacity to make responsible decisions with respect to his hospitalization. Within thirty (30) days after the admission of the defendant into the hospital, the superintendent of the hospital is required to certify to the Court whether or not the conditions which required his hospitalization still exist. If so, the defendant will be detained in the hospital and the superintendent is required to cause him to be examined as often as practicable, but not less often than every six (6) months. The Court may at any time, on the basis of reports to the Court by the superintendent and such further inquiry as the Court considers appropriate, order indeterminate hospitalization or dismissal. The order of hospitalization shall state whether the defendant shall be detained for an indeterminate or for a temporary period and, if for a temporary period, then for how long." T., 836.

This was erroneous and prejudiced the rights of the petitioner because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury and for the reasons set forth in 4 and 8, above.

18. The Trial Court erred in refusing to grant the petitioner's Special Request No. 5, as follows:

> "I charge you that, if you find that the defendant, at the time of shooting his sister, was legally insane, and therefore return a verdict of not guilty by reason of insanity, Tennessee law provides a procedure by which the defendant may be committed to a state mental hospital for custody, care, and treatment. The period of such treatment is a

> matter for the Court and the superintendent of the state mental hospital." T., 826.

This was erroneous and prejudiced the rights of the petitioner because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury and for the reasons set forth in 4 and 8, above.

19. The Trial Court erred in refusing to grant petitioner's Special Request No. 4, as follows:

> "I charge you that, if you find that the defendant, at the time of shooting his sister, was legally insane, and therefore return a verdict of not guilty by reason of insanity, Tennessee law provides a procedure for requiring that the defendant receive such hospitalization, care, and treatment as may be deemed necessary by the Court and the superintendent of the state mental hospital."

This was erroneous and prejudiced the rights of the petitioner because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury and for the reasons set forth in 4 and 8, above.

20. That the Trial Court erred in refusing to grant petitioner's Special Request No. 2, as follows:

> "I charge you that, in determining whether the defendant is guilty or not guilty by reason of insanity, you should consider only the defendant's state of mind at the time of the act, and you should not consider or concern yourself with the consequences of your verdict. The consequences of the verdict and the treatment and care of the defendant after the verdict is a matter for the Court to handle under the laws of the State of Tennessee." T., 823.

This was erroneous and prejudiced the rights of the petitioner because the Special Request correctly stated the law and was

not set out in the Court's general charge to the jury and for the reasons set forth in 4 and 8, above.

21. The Trial Court erred in refusing to grant petitioner's Special Request No. 1, as follows:

> "I charge you that, if you find that the defendant, at the time of shooting his sister, was legally insane, and therefore return a verdict of not guilty by reason of insanity, the subsequent treatment of the defendant is a matter for the Court and for the appropriate officials of the state mental hospital." T., 822.

This was erroneous and prejudiced the rights of the petitioner because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury and for the reasons set forth in 4 and 8, above.

22. The Trial Court erred in refusing to grant the petitioner's Special Request No. 13, as follows:

> "I charge you that, under the evidence, the greatest offense of which you may find the defendant guilty is voluntary manslaughter." T., 834.

This was erroneous and prejudiced the rights of the petitioner because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury.

23. The Trial Court erred in refusing to grant the petitioner's Special Request No. 11, as follows:

> "I charge you that the statutory definition of manslaughter is:
>
> > 'the unlawful killing of another without malice, either expressed or implied, which may either be voluntary upon a sudden heat, or involuntary, but in the commission of some unlawful act'." T., 832.

This was erroneous and prejudiced the rights of the petitioner because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury.

25. The Trial Court erred in refusing to grant the petitioner's Special Request No. 12, as follows:

> "I charge you that involuntary manslaughter is a killing without the intent to inflect the injury and that voluntary manslaughter is a killing which is done in passion but with concurring will and intent to inflict the injury which produces the death." T., 823.

This was erroneous and prejudiced the rights of the petitioner because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury.

26. The Trial Court erred in refusing to grant the petitioner's Special Request No. 14, as follows:

> "A person who kills another as the result of an insane delusion is not acting with malice."
>
> T., 835.

This was erroneous and prejudiced the rights of the petitioner because the Special Request correctly stated the law and was not set out in the Court's general charge to the jury.

27. The Trial Court erred in its charge to the jury in that it failed to instruct the jury properly as to the State's burden of proving beyond a reasonable doubt that the petitioner was legally sane at the time of the act and as to the meaning of that burden. (T., 811, 817-821). The Court's charge in this respect is quoted fully below in the Brief, at pages 132-138. This was erroneous and prejudiced the rights of the petitioner in that it failed to explain adequately to the jury the application of the reasonable doubt standard to the insanity defense and therefore denied the petitioner a decision by the jury under the correct legal standards.

28. The Trial Court erred in its charge to the jury in that it failed to instruct the jury properly as to the application of the so-called M'Naghten Rule and the Court several times stated that portion of the M'Naghten Rule relating to the ability to distinguish right from wrong without stating that portion of the Rule relating to the knowledge of the nature and quality of the act. (T., 817-818). The Court's charge in this respect is quoted in full below in the Brief, at pages 132-138. This was erroneous and prejudiced the rights of the petitioner in that it denied the petitioner a decision by the jury under the correct legal standards.

29. The Trial Court's instructions to the jury with respect to expert witnesses were in error. (T., 814). The Court's instructions in this regard were as follows:

> "The jurors are the sole judges of the facts. Expert witnesses have been allowed to testify as to certain matters of issue in this case and to state their opinions. With reference to this testimony, which you should consider and judge along with all the other proof, the Court charges you that it should be received with caution. While this kind of testimony is simetimes the only means or the best way to reach the truth, yet it is largely a field of speculation, beset with pitfalls and uncertainties, and requires patience and intelligent consideration as all the other proof, governed by the same rules to arrive at the truth as you are governed by in your consideration of all the proof."

This was erroneous and prejudiced the rights of the petitioner in that it denied the petitioner a decision by the jury under the correct legal standards and because the sole issues in this case were issues requiring the testimony of experts and the full consideration thereof by the jury and the instructions encouraged the jury to disregard such testimony, and for the reasons set forth in 14, above.

30. The Trial Court erred in failing to charge the jury that the jury should view the opinions expressed by lay witnesses with respect to the ultimate issues in the case with at least the same degree of caution and skepticism with which the Court instructed the jury to view the testimony of expert witnesses. (T., 814). The Court's instructions in this regard are set forth in 29, above.

31. The Trial Court erred in charging the jury to determine whether the presumption of sanity had been overcome or remained in the case at the end of the proof, since by that time the presumption of sanity had as a matter of law been overcome and the State was as a matter of law clearly under the burden of proving beyond a reasonable doubt that the petitioner was not legally sane at the time of the act and with respect to the act. (T., 561-5; 579-80; 605; 817). The Court's charge in this respect was as follows:

> "The Court instructs you that *if* there is sufficient evidence introduced in this hearing on behalf of the defendant to overcome the presumption of sanity and to raise in your minds a reasonable doubt as to whether the defendant was able to distinguish right from wrong and know his act was wrong at the time of the commission of the alleged offense, then the burden is upon the state to show, by evidence of sanity, beyond a reasonable doubt, that . . ."
>
> (T., 817). (Emphasis added.)

This was erroneous and prejudiced the rights of the petitioner in that it denied the petitioner a decision by the jury under the correct legal standards.

32. The Trial Court in its charge to the jury failed to give sufficient emphasis to the fact that the only real issue in the case was whether, at the *very time* of the shooting and with respect to that particular act, the petitioner was legally insane and did not know the nature and quality of that act or, if he did know

its nature and quality, did not know that it was wrong. The relevant portions of the charge are set forth below at pages 132 ff of the Brief. This was erroneous and prejudiced the rights of the petitioner because the charge, by giving undue attention and emphasis to matters which would not be at issue in the case if a plea of insanity were good, matters which were not in fact contested by the petitioner at the trial, indicated to the jury that the Court did not believe that a verdict of not guilty by reason of insanity should be returned and improperly influenced the jury to return a verdict of guilty.

33. The Trial Court erred in refusing to give to the jury an additional written charge and in failing to re-read all or relevant portions of the charge in response to questions asked by the jury after the jury had retired. (T., Vol. VII, 2-6; 9-19). This was erroneous and prejudiced the rights of the petitioner because it denied to the petitioner his right to have the jury fully advised by the Court with respect to the applicable law.

34. The Trial Court erred in giving to the jury the oral comment and instruction which it did give in response to the question asked by the jury after the jury had retired, in violation of TCA § 40-2515. (T., Vol. VII, 2-6; 9-19). This was erroneous and prejudiced the rights of the petitioner for the reasons set forth in 33, above, and because it was in violation of TCA § 40-2516.

35. The Trial Court erred in failing to grant the petitioner's Motion for Judgment Notwithstanding the Verdict or for New Trial. (T., Vol. I, 29-37, 57).

36. The errors committed by the Court as set forth above, and each of them, deprived the plaintiff in error of his rights under the United States Constitution, including without limitation his rights under the Fourteenth, Sixth, Fifth, and Fourth Amendments thereto.

37. The Court of Criminal Appeals erred in failing to give proper consideration to the errors set forth in the Assignments of Error and Brief filed in behalf of petitioner in that Court and reiterated in Assignments of Error, 1-36, above, and in failing to reverse the conviction upon the basis of such errors and to grant the petitioner a judgment of not guilty by reason of insanity or a new trial to be conducted free of such errors.

APPENDIX H

State of Tennessee
Department of Mental Health
Central State Psychiatric Hospital
1501 Murfreesboro Road
Nashville, Tennessee 37217

Memorandum:

To: C. Richard Treadway, M. D.
Commissioner Department of Mental Health
State of Tennessee

From: Investigative Committee
FSD Unit—Central State Psychiatric Hospital

Subject: Findings Regarding Mrs. Nona Owensby
Junior Clinical Psychologist
Central State Psychiatric Hospital

Following are the findings of the Investigative Commitee regarding Mrs. Nona Owensby:

1. That she exceeded her authority in testifying before courts regarding matters of probation, parole, suspension of sentence, leniency, and insanity.
2. That she arranged for and conducted psychotherapy, privately, with patients acquired because they were former patients, for a charge of $15.00 per hour, in violation of departmental regulations.
3. That she conducted her sessions with private patients on State property.

4. That she flagrantly exceeded the authority of her license as a Psychological Examiner.
5. That she failed or refused to pursue clarification of the extent of her licensed authority when brought to her attention and continued her activities.
6. That she furnished courts, attorneys for patients and district attorneys with "Qualifications an as Expert Witness" containing information that was inaccurate and misleading, inferring that her professional education and capabilities exceeded those actually possessed.
7. That she initiated correspondence concerning patients without ascertaining that copies were placed in patients' files.
8. That she considered herself competent to counsel, evaluate and perform all duties without supervision and did so.
9. That she assumed that her superiors knew of her activities without specifically informing them. This is a failing of the system as well as neglect on the part of Mrs. Owensby.
10. That she held herself out to be a psychologist by using her "working title" as an indication of professional qualifications tending to mislead courts before whom she gave testimony, attorneys representing patients, district attorneys patients, and staff at FSD.

/s/ THOMAS O. H. SMITH, JR.
THOMAS O. H. SMITH, JR.
Chairman

/s/ MERLIN W. SEPMEYER
MERLIN W. SEPMEYER
Committee Member

GARLAND P. SMITH
Committee Member

/s/ DR. LUCY WILSON
DR. LUCY WILSON
Committee Member

/s/ JANICE SPILLMAN
JANICE SPILLMAN
Committee Member

/s/ ANDREW EARL
ANDREW EARL
Committee Member

/s/ FRANK WENTWORTH
FRANK WENTWORTH
Committee Member

GWENDOLYN S. JOHNSTON
Recorder

The Tennessean, Tuesday, October 1, 1974

FELL IN LOVE WITH PATIENT WITNESS SAYS

By Nancy Varley

A Central State Psychiatric Hospital social worker supervisor testified yesterday that she fell in love with a patient who later threatened, she said, to "make a dramatic expose" unless she gave him money.

In addition, a junior psychological examiner acknowledged that she counseled former patients for fees after they were released from the hospital.

The Testimony Came during hearings by a special committee named by State Department of Mental Health Commissioner Richard Treadway to investigate charges of employe misconduct at the psychiatric facility.

Marcia Roe, a social worker supervisor, told the seven-member group that she became "personally involved" with former patient Woody Raymer about a year ago when he was a patient at the hospital's maximum security unit.

Raymer, a patient at Central State for almost a year, made specific charges against several staff members at the hospital, and those charges led to the investigation.

Mrs. Nona Owensby, a psychological examiner, admitted that she has seen two patients for counseling and accepted a fee after they were released from the hospital and received suspended sentences for crimes they had committed.

Under questioning by committee Chairman Thomas O. H. Smith, Jr., Miss Roe said she had known Raymer for the entire time she was employed at Central State, but became involved with him only during his last few weeks at the facility.

Her attorney, Hal, characterized Raymer as a "very attractive man," adding that his client was concerned for Raymer and believed he could be rehabilitated.

"She Doesn't deny any personal involvement. It was a case of bad judgment and has happened 1,000 times in every country in the world," he said.

Miss Roe said Raymer volunteered to help social workers with recreational therapy for other patients and was in and out of her office frequently, especially after it was moved nearer the patient area. "After that time, Mr. Raymer came to my office more frequently and we would discuss our personal feelings," she said.

She Said Raymer led her to believe he was not mentally ill and she felt he was "on the verge of getting out and getting back into society."

Dressed in a brown dress with her brown hair straight and parted in the center, Miss Roe appeared calm during testimony, speaking softly and drinking water frequently.

"I believed this was so until after his transfer to the workhouse—it wasn't until then that he became demanding and irrational," she said.

Even Then, she said, she believed he was only "testing" her and would not really follow through with what she said were threats to expose their relationship and destroy her career.

She said she visited Raymer after he was moved to the jail from Central State and that he asked her for small amounts of money for "shampoo and soap which he said he would pay back when he got out."

She said she also supplied funds for an attorney for a friend of Raymer's at the workhouse because Raymer told her the inmate would help him later.

The Social worker said she came "to wit's end" with what she charged were threats, and spoke to her supervisor at Central State.

Colleen McClain advised her not to visit Raymer and to tell him to write and document any complaints he had against the hospital, she said. She said Raymer never did so.

Miss Roe also said she never agreed to testify for Raymer at a hearing on his competency to stand trial although, she testified, he indicated he wished her to.

Miss Roe, currently suspended with pay from her job, told the committee she hopes to continue in social work, but has offered to resign from Central State.

Mrs. Marsha Naggs, director of social services at the hospital and Miss Roe's superior, said she feels it may be impossible for Miss Roe to continue in her duties at the hospital because of widespread publicity given the allegations.

When asked if she felt Miss Roe should transfer to another facility in the state, she said such a move would "be up to Miss Roe."

Both Miss Roe and Mrs. Naggs said they have no personal knowledge of any other incidents of misconduct at the hospital.

Raymer had also alleged that he had sexual relations with Miss Roe while at the facility, but a lie detector test indicated this not true.

None of the committee members questioned Miss Roe in regard to that allegation yesterday and Smith said he felt it did not involve the group.

"That Is something of an extremely personal nature and didn't really involve her professional capability as a social worker," he said.

Smith explained that the committee was convened to recommend to Treadway what actions should be taken in regard to all the allegations and added he was "not impressed that Raymer didn't pass the lie detector test in this regard."

In her testimony before the committee, Mrs. Owensby said she has testified in court as an expert witness on patients' competence to stand trial and at times has contacted defense attorneys if a patient suggested it to her.

The Tennessean, Wednesday, October 2, 1974

Central State Testimony Continues

CLOSE HOSPITAL UNIT: EX-WORKER

By Nancy Varley

A former State Mental Health Department official said yesterday she is "deeply concerned" about Central State Psychiatric Hospital's maximum security unit and hopes it can be closed down as soon as possible.

In testimony before a special committee investigating allegations of hospital employe misconduct, Mrs. Joyce Laban, former director of the Forensic Services Division, said the facility should be decentralized.

But, Mrs. Nona Owensby, a junior clinical psychologist at the maximum security unit, who is charged with counseling former patients for fees, said the unit "used to be a bad place," but has undergone a "metamorphosis" in the last 10 years.

Mrs. Labon appeared before the seven-member group after Mrs. Owensby testified Monday the former director was aware of her

(Turn to Page 8, Column 3)

counseling and had, in fact, suggested she do it.

Mrs. Laban testified that she was not aware of, did not suggest and would not have had the authority to approve the counseling.

Mrs. Owensby had testified that Mrs. Laban's suggestion came during a conversation between the two of them and Dr. Jacob Fidelholtz, former chief physician at the hospital.

"Even if she said I had the authority I had no authority to give permission to do that," Mrs. Laben said.

Mrs. Owensby, who finished her testimony yesterday before the special committee by Mental Health Commissioner Richard Treadway, currently is suspended from her job pending the committee's recommendation on what action should be taken in regard to her.

She Said during yesterday's hearings that she counseled three former patients and two other persons for money at her hospital office.

The three former Central State patients referred to as "X, Y and Z," paid her $15 per visit, she said.

Mrs. Owensby maintained she did not solicite any of the patients and counseled them only after her normal working hours at the maximum security unit.

She Said she saw "X" 32 times, "Y" 16 times, and "Z" for four sessions.

She said she also counseled two other persons, one of whom was referred to her by a psychologist and the other who approached her about counseling.

Under questioning by committee chairman Thomas O. H. Smith Jr., Mrs. Owensby said she never told patients she would appear for them in court in their behalf if they paid her for counseling.

Another point the committee pursued yesterday was Mrs. Owensby's testimony in many court cases as an expert witness when a Mental Health Department directive states only psychologists and psychiatrists can testify as such.

She contends that she has testified, but only after being subpoenaed and that she did not misrepresent her qualifications.

Asst. Dist. Atty. Gen. Rick McCulley read a court record at the hearing in which Mrs. Owensby identified herself as a psychologist.

She Admitted being "sloppy" in her use of the term "psychologist," but offered the explanation that a hospital charting of the line of employees listed her as "unit psychologist."

"Mrs. Owensby, there isn't any way in the world a designation in the hospital could enlarge your professional capability, is there?" Smith sad.

"No, sir," she answered.

Colleen MacLean, administrative director of the maximum security unit, said she can remember two or three conversations with Mrs. Owensby in which the junior clinical psychologist mentioned she had a "private practice."

She said she was aware of only one former patient Mrs. Owensby had counseled and did not know she was paid money.

Mrs. Owensby also testified that suspended Central State social worker supervisor Marcia Roe gave the family of former maximum security patient, Woody Raymer $1,500 for attorney fees for Raymer.

Miss Roe, who is charged with becoming personally involved with Raymer, told the committee Monday she only gave him small amounts of money.

Near the end of her approximately five hours of testimony yesterday, Mrs. Owensby told the committee she would like to continue in her job and feels she has been "a good employee."

"I don't feel my competence has been diminished," she said. "I am eager to find out what adjustments I should make to fulfill my position.

"I was already working on that and could have done it without all this sensationalism."

The committee will resume its hearings at 9:30 a.m. today at the University of Tennessee-Nashville. Joanne White, a secretary in the maximum security unit, is expected to testify.

The Tennessean, Wednesday, October 9, 1974

PROBERS RECESS AFTER LISTING NEW FINDINGS

By Nancy Varley

A special committee investigating Central State Hospital adjourned indefinitely yesterday after listing its findings on hospital aide Ellis Smotherman and junior clinical psychologist Mrs. Nona Owensby.

The panel agreed to reconvene as soon as written statements of further allegations against hospital employes are obtained by investigators.

Tennessee Bureau of Identification agent Andrew Earls estimated that it may take two weeks to investigate and get statements against others.

The seven-member panel approved 10 findings in regard to Mrs. Owensby and four in Smotherman's case.

Committee Chairman Thomas O. H. Smith Jr. said the panel has "absolutely no proof" that allegations that Smotherman has had homosexual relations with patients are true, although Smotherman has admitted being homosexual.

However, members felt that Smotherman's refusal to take a polygraph test on the allegations, and some "gaps" in his testimony, raised doubts about his statements. They especially questioned Smotherman's testimony that he kept an escapee from an Alabama jail, who was a former Central State patient, at his home for several hours and then drove him to visit friends, not knowing he was a fugitive.

He told the committee last week that the man called him early in the morning on his off day and that he believed the man found his (Smotherman's) name and address in the phone book.

Findings in regard to Smotherman included:

That he sold two phenobarbital tablets to an informer for $5. The finding was based on testimony of Robert Lea, a former Metro officer who took part in an undercover drug investigation at the maximum security unit, and corroborated by the State Toxicology Laboratory, although denied by Smotherman.

That his conduct with the fugitive was questionable and Smotherman did not explain the details of the incident to the satisfaction of the committee.

That although he admitted he is a homosexual, he denied any activity with patients at the maximum security unit. The committee feels that the nature of the duties of an aide and the potential for relationships with patients presents an extreme risk to patients.

That when asked if he would submit to a polygraph Smotherman refused to take the test on any portion of his testimony.

Findings in Mrs. Owensby's case included:

That she exceeded her authority in testifying before courts on matters of prob parole, suspension of sentence, leniency and insanity.

That she conducted psychotherapy privately with former patients for $15 per hour in violation of departmental regulations.

That she conducted her sessions with private patients on state property.

That she flagrantly exceeded the authority of her license as a psychological examiner.

That she failed or refused to pursue clarification of the extent of her licensed authority when this was brought to her attention, and continued her activities.

That she furnished courts, defense attorneys and district attorneys with "Qualifications as an Expert Witness" containing information that was inaccurate and misleading, implying professional education and capabilities exceeding those actually possessed.

That she initiated correspondence concerning patients . . .

That she considered herself competent to counsel, evaluate and perform all duties without supervision and did so.

That she assumed her superiors knew of her activities without specifically informing them. This is a failing of the system as well as neglect on the part of Mrs. Owensby, according to the finding.

That she held herself out to be a psychologist by using her "working title" as an indication of professional qualifications, tending to mislead courts before she gave testimony.

In discussing Mrs. Owensby, the committee also discovered that the state's job description of her position did not correspond with the capabilities specified by the Board of Healing Arts when it licensed her.

Most of the difference was in regard to the treatment she was allowed to minister to patients, and committee members agreed the designations did not relate to their findings.

In Another development yesterday, Woody Raymer, a former patient at Central State and now an inmate at the Metro Workhouse, submitted a handwritten statement of allegations to the committee through a newsman.

Raymer, whose charges sparked the investigation into the institution, failed to pass a lie detector test given him for the district attorney's office after he made the charges.

Raymer also had declined to testify before the investigating committee earlier on the advice of his attorney.

Yesterday in his statement he charged that the polygrapher "failed me on purpose" and offered to submit to another test to prove his allegations.

The committee decided the five-page statement, handwritten by Raymer at the workhouse, did not meet the requirements for statements, which in the cases of other witnesses were given in the presence of members of the district attorney's staff or the TBI.

The group asked TBI agent Earls to obtain another statement from Raymer and if possible, have another polygraph test administered.

Raymer may be asked to testify when the panel resumes hearings on any new allegations, Smith said, adding that his information had no bearing on the three employes already investigated.

THE TENNESSEAN, Thursday, October 10, 1974

2 HOSPITAL AIDES FIRED, 1 SUSPENDED

By Nancy Varley

State Mental Health Commissioner Richard Treadway fired Central State Hospital psychological examiner Mrs. Nona Owensby and psychiatric aide Ellis Smotherman yesterday and suspended social worker supervisor Marcia Roe.

In letters to Central State superintendent, Dr. William C. Godsey, Treadway directed him on the action to be taken in each case based on the findings of a special investigating committee.

Godsey reportedly met with the three employes yesterday morning to inform them of the commissioner's instructions.

Jerry Daniels, attorney for Mrs. Owensby, said his client was dissatisfied with the decision, adding that he will consider taking further legal action "at the proper time."

In its findings on Mrs. Owensby, the committee stated that she counseled former Central State patients for fees, misrepresented herself as a psychologist and exceeded her authority in testifying before courts as an expert witness.

Treadway said in his letter firing Mrs. Owensby, that the state comptroller's office "is reviewing her receipt of private funds from discharged patients and some form of restitution may be required."

The letter also stated that Mr. Owensby "exceeded her authority within the Forensic Services Division by communicating specific recommendations to various district attorneys and other officials in the legal field without the knowledge of her superiors."

Mrs. Owensby acknowledged before the committee that she had written attorneys for patients making recommendations and attaching a list of "Qualifications of an Expert Witness," which was misleading as to her education.

Treadway's letter regarding Smotherman was brief and stated that the grounds for his dismissal "are the findings of the committee which constitutes conduct unbecoming a state employe."

Allegations against Smotherman were that he had been homosexually involved with a patient and had kept a former patient who was a fugitive from Alabama at his home. He was also allegedly involved in drug trafficking at the institution.

The aide testified that he was a homosexual, but denied that he had had sexual relations with a patient or had been involved with drugs.

However, he refused to take a lie detector test on the allegations.

Miss Roe, who admitted falling in love with former Central State patient Woody Raymer, now an inmate at the Metro Workhouse, may return to work after a 60-day suspension without pay, the commissioner's letter said, but she will be on probation for six months following her return.

Hal Hardin, Miss Roe's attorney, said he and his client is "most definitely dissatisfied with the decision."

"She is heartbroken because of what she has been subjected to and by the committee's action," he said, adding that her suspension was "a senseless overreaction which will obviously affect her reputation, character and professionalism."

In its eight-point list of findings concerning Miss Roe, the committee stated it was impressed with her forthright manner in testifying.

Meanwhile, yesterday, Raymer, whose allegations sparked the investigation of Central State, said he was tricked on a lie detector test given him by the district attorney's office.

Memphis Commercial Appeal

2 DISMISSED AFTER HOSPITAL PROBE

Nashville, Oct. 9.— (UP!) — Acting on the findings of a special investigative committee, state Mental Health Commissioner Richard Treadway Wednesday fired two employes of Central State Psychiatric Hospital.

Treadway dismissed Mrs. Nona Owensby, a psychological examiner, and Ellis Smotherman, a hospital aide.

Marcia Roe, a social worker at the hospital's maximum security unit, was suspended 60 days without pay for her alleged involvement with a former patient.

Mrs. Owensby, who admitted treating private patients on state property, was fired for "exceeding her authority as a psychological examiner and conduct unbecoming a state employee."

Smotherman, recently transferred to another section of the hospital because of suspected drug trafficking, was dismissed for "conduct unbecoming a state employe."

During testimony before the committee, Smotherman admitted that he was a homosexual but denied selling drugs or having relations with any of the maximum security patients.

"The committee feels that the nature of the duties of an aide, the potential for relationships with patients presents an extreme risk to patients," the panel said in its report.

The committee said Miss Roe became "romantically involved" with a hospital patient for approximately three weeks last spring.

The investigative committee was formed following charges by a former Central State patient, Woody Raymer, of sexual misconduct involving some hospital staff members and some patients.

APPENDIX I

State of Tennessee
Department of Mental Health
Cordell Hull Bldg. Nashville, Tenn. 37219
Mental Health Rule and Regulation
53-74

To: Assistant Commissioners
Directors
Hospital Superintendents
Mental Health Center Directors

Date: 29 July 1974

Subject: Expert testimony on the defense of insanity

The Department of Mental Health has a responsibility to the courts of the state to provide information and assistance of a consistent quality. This rule establishes the policy of the Department of recognizing, among its employees and consultants, persons who may offer expert testimony as to the defense of insanity.

Any employee of or consultant to the Tennessee Department of Mental Health who testifies as an expert witness in a criminal case as to the issue of the defense of insanity, must have earned the Ph.D. degree in clinical psychology and be licensed to practice in the State of Tennessee in accordance with the provisions of Title 63, Chapter 11 of the Tennessee Code Annotated, or must be a psychiatrist, who is licensed to practice medicine in the State of Tennessee in accordance with the provisions of Title 63, Chapter 6 of the Tennessee Code Annotated, and have completed a psychiatric residency in an accredited program.

It is for a Court of Law to make the ultimate determination as to whether a particular witness may be considered an expert on the defense of insanity, and any employee of or consultant to the Tennessee Department of Mental Health who is called before a Court to offer testimony must comply with the Court's request. The clinical psychologist who is licensed to practice in the State of Tennessee and the psychiatrist who is licensed to practice medicine in the State of Tennessee are recognized by the Tennessee Department of Mental Health as experts for the purpose of offering expert testimony as to the defense of insanity.

Statutory Authority: Tennessee Code Annotated, Sections 104 and 105 of Title 33.

/s/ RICHARD TREADWAY
C. RICHARD TREADWAY, M.D.
Commissioner

APPENDIX J

Office of the Attorney General
Supreme Court Building
Nashville, Tennessee 37219

September 24, 1975

Honorable Lucius E. Burch
Attorney-at-Law
130 North Court Street
Memphis, Tennessee 38103

Re: *Edwards vs. State*

Dear Mr. Burch:

It was a pleasure to see you in Nashville yesterday. As I mentioned to you, the Legislature, by Chapter 77 of last session, left it discretionary with the Supreme Court, when it granted certiorari, to set the cause for argument at the time they grant the writ. Attorneys have thirty days to demand oral argument, if they wish.

This law, however, went into effect after the writ was granted in the *Edwards* case, and Chief Justice Fones has advised me that any granted before this act went into effect will be set down for oral argument.

General Ashley and I have discussed this case and have concluded that we have a responsibility to the Court to advise them concerning the misrepresentation of qualifications by Mrs. Nona Owensby at the trial, and would suggest that even though the material you have filed in that regard is de hors the record, that

the Court, because of the unusual circumstances, should consider it. If you have no objection, I would like to make that announcement to the Court prior to your opening argument on the merits.

Sincerely,

/s/ ROBERT H. ROBERTS
ROBERT H. ROBERTS
Advocate General

RHR:mb

September 25, 1975

Honorable R. A. Ashley, Jr.
Attorney General
State of Tennessee
Supreme Court Building
Nashville, Tennessee 37219

Honorable Robert H. Roberts
Advocate General
State of Tennessee
Supreme Court Building
Nashville, Tennessee 37219

Re: *State v. Edwards*

Gentlemen:

I wish to thank you for the opportunity afforded me to call your attention to the condition of the proof underlaying the verdict and judgment in *State v. Edwards* presently before the Supreme Court on certiorari. I have not the slightest doubt of

the effect of a perusal of the record and of disclosure subsequent to the opinion of the Court of Appeals will have upon your minds and consciences. The question is, what is the duty of a prosecutor under such circumstances? I suggest that this question is answered most eloquently by the per curiam opinion of the Supreme Court of Tennessee in *Fout v. State*, 4 Tenn. 98. There an indictment was signed by a specially appointed prosecutor. The Court struck down the indictment and in the opinion outlined the duties of the Attorney General:

> "He is to judge between the people and the government; he is to be the safeguard of the one and the advocate for the rights of the other; he ought not to suffer the innocent to be oppressed or vexatiously harassed, any more than those who deserve prosecution to escape; he is to pursue guilt; he is to protect innocence; he is to judge of circumstances, and, according to their true complexion, to combine the public welfare and the safety of the citizens, preserving both, and not impairing either; he is to decline the use of individual passions, and individual malevolence, when he cannot use them for the advantage of the public; he is to lay hold of them where public justice, in sound discretion, requires it. Can these views be attained by leaving prosecutions to every attorney who will take a fee to prosecute? Does every one feel the responsibility imposed by the oath of the solicitor-general by his selection for the discharge of these duties, by the confidence of the public reposed in him, by a consciousness of the impartial duties he owes to society and his country? Is every one actuated for the solicitor-general with the proud ambition of equalling the public expectation, and proving to his country that they have not been deceived in making choice of him? Is every one in his behalf under the full operation of those thousand feelings excited by confidence in his integrity, which a virtuous mind will experience, which nothing but experience can give a knowledge

of, and which cannot be adequately represented by words? The designs of the constitution are disappointed by suffering the interference of any other, and therefore most clearly it ought not to be allowed, not excluding those temporary officers who are legally appointed by the governor or court where such temporary appointments are provided for by law."

The rule is recognized lately in *Aldridge v. State*, 470 S.W. 2d 42 (Court of Criminal Appeals of Tennessee, 1971):

"We are not unmindful of the time-honored and salutary rule of law that a public prosecutor is not a plaintiff's attorney, but a sworn minister of justice, as much bound to protect the innocent as to pursue the guilty, and that he has no right to suppress testimony."

Thanking you for your consideration, I remain

Respectfully,

LUCIUS E. BURCH, JR.

LEBjr:lm

September 26, 1975

Honorable Robert H. Roberts
Advocate General
Supreme Court Building
Nashville, Tennessee 37219

Re: *Edwards v. State*

Dear General Roberts:

Thank you very much for your letter of September 24th which crossed mine of yesterday in the mail.

I certainly agree with your suggestion that the announcement that you intend to make can be made in advance of commencement of my opening argument.

Thanking you for the courtesy and consideration that you have given us in this matter, I remain

Sincerely,

LUCIUS E. BURCH, JR.

LEBjr:lm

November 7, 1975

Jewell Redden, Clerk
Supreme Court of Tennessee
Jackson, Tennessee 38301

Re: Edwards v. State of Tennessee
Shelby Criminal No. 23

Dear Mrs. Redden:

Enclosed are six copies of a letter dated September 24, 1975 from Robert H. Roberts, Advocate General, State of Tennessee, to me regarding the above matter. I would appreciate it if you would file this letter and bring it to the attention of the justice.

Sincerely yours,

BURCH, PORTER & JOHNSON
LUCIUS E. BURCH, JR.

LEB:sms

cc: Robert H. Roberts

APPENDIX K

In the Court of Criminal Appeals of Tennessee
Jackson, October Session, 1971

Edward Pete Richard,
Plaintiff in Error,
v.
State of Tennessee,
Defendant in Error.

No. 8
Shelby Criminal
(Assault and Battery With Intent to Rape)

For Plaintiff in Error:

Hugh Stanton, Sr., Esq.
Lincoln American Tower Building
Memphis, Tennessee

Hugh Stanton, Jr., Esq.
Lincoln American Tower Building
Memphis, Tennessee

For Defendant in Error:

David M. Pack
Attorney General
Nashville, Tennessee

Thomas E. Fox
Deputy Attorney General
Nashville, Tennessee

Billy F. Gray
Assistant Attorney General
Shelby County Office Building
Memphis, Tennessee

Earl Fitzpatrick
Assistant Attorney General
Shelby County Office Building
Memphis, Tennessee

Reversed and Remanded

Opinion Filed: March 8, 1972

Charles H. O'Brien, Judge

OPINION

On April 12th, 1966, an indictment was returned against the defendant, Edward Pete Richard, charging him with assault and battery upon a female over the age of twelve (12), with intent to have unlawful carnal knowledge of her, forcibly and against her will. On May 21st, 1970, a jury verdict was returned finding the defendant guilty and fixing his punishment at ten (10) years in the State Penitentiary, upon which the court entered judgment accordingly. On November 6th, 1970, motion for new trial was heard and overruled, upon which appeal in the nature of writ of error was perfected to this court.

Seven Assignments of Error are submitted without argument, with the exception of Assignment of Error No. III, to which we give our present consideration.

Assignment of Error No. III:

> "The Trial Court erred in overruling defendant's Amended and Supplemental Motion for New Trial Ground IV, which is in words and figures as follows:
>
> IV
>
> The defendant's proof and (sic) insanity at least neutralized the presumption of sanity, but the State failed

to prove in rebuttal that he was legally sane at the time of the crime; and, therefore, the jury verdict finding defendant guilty as charged was contrary to the law and evidence on insanity."

In our review of this assignment we first set forth in chronological order the various reports of psychiatric examinations, and mental hearings, found in the record.

On May 10th, 1966, the Trial Court ordered a medical examination of the defendant to determine his mental condition and need of care and treatment in a mental hospital.

On May 23rd, 1966, an order was entered directing the transfer of petitioner to the Central State Hospital for mental examination upon the certificate of two (2) examining physicians certifying that defendant was mentally ill and in need of care and treatment in a mental hospital.

June 22nd, 1966, an order was entered granting additional time for examination of defendant upon request from Central State Hospital.

August 25th, 1966, a report of psychiatric examination was submitted to the Trial Court from Central State Psychiatric Hospital setting forth, "after observing the patient from the time of admission and doing the usual mental, psychological, physical and laboratory examinations, we, the undersigned staff members unanimously agree that he is insane at the present time. He shows evidence of a psychosis and has during his entire stay here. We believe he does not know right from wrong and that he is incompetent to advise counsel in his own defense; therefore, we suggest commitment at this time."

September 13th, 1966, an order was entered confirming a plea of present insanity upon a jury verdict to that effect.

January 2nd, 1970, a report of psychiatric examination was filed to the effect that "After careful observation over a

long period of time of the patient, reviewing the records and extensively interviewing the patient he was brought to staff on December 30th, 1969, to determine his present mental status and as to whether he is able to stand trial. Our hospital staff came to the unanimous decision that Mr. Richard has improved sufficiently that he is considered competent, knows right from wrong and shows no evidence of a psychosis at the present time; therefore, we believe he is able to advise counsel in his own defense and should be returned to court for disposition of his case."

January 12th, 1970, an order was entered finding the defendant competent to stand trial.

The facts in this case are this. On March 6th, 1966, Pamela Sue Ball, an employee in the laboratory at John Gaston Hospital was traversing a tunnel which extended from John Gaston Hospital to the adjacent Bowld Hospital. As she went through the hospital corridors to the tunnel she saw a man who appeared to be following her.

In approximately 45 minutes she returned, via the elevator from the 3rd floor of Bowld Hospital to the basement tunnel leading to the stairs which it was necessary to ascend to return to the laboratory. The hour was between 9:00 and 10:00 on a Sunday morning. It appears there was little or no pedestrian traffic at this time and place. On her original journey through the corridor, prior to reaching the stairs leading to the tunnel Mrs. Taylor heard footsteps, and turning saw a Negro man walking behind her. She stated she turned a couple of corners prior to reaching the stairway and it appeared that the man set his pace to hers, that is, walked faster when she walked faster, and slower when she slowed down. She went down the stairway which is only wide enough to accommodate one person at a time, and since it was Sunday morning everything was closed on that end of the corridor and there was no one else

around, "with a strange man there, I just didn't want to be there by myself so I didn't wait on the elevator and I went up the steps to the 1st floor where I caught the elevator going up to, I think it was the 3rd floor where I was going." On her return trip she was carrying a plastic tray loaded with plastic syringes, alcohol sponges, gauze, glass tubes, and vials of blood which she had collected. When she disembarked from the elevator in the basement tunnel, a man came out of the staircase nearby and began following her along the tunnel, endeavoring to engage her in conversation. Walking a little faster than normal, she started up the stairway to John Gaston Hospital with the man walking behind her because the stairway was not wide enough for two people to walk side by side. He began rubbing the back of her legs and said, I'm gonna get you", upon which she started running up the rest of the stairs. When she got to the top of the stairs he jumped on her from behind and she fell to the floor face down. The contents of the tray in her hand were scattered, and he was on her back and she was screaming and kicking. He had a hand on her neck and was choking her. She kept screaming and he said if she didn't stop screaming he would kill her. She kept screaming, she was lying with her face to the floor with the man on her back. He touched her all over her body, over her dress and he was pulling on her clothes. He put his hand under her dress and touched her private parts over her girdle. She continued to scream hysterically. The man remained on her back a matter of two or three minutes as nearly as she could recollect. Finally he got up. When she realized he was no longer on her back she got up, stopped and turned around to see where he was and he was standing at the top of the stairway with his body facing like he was going down the steps but was turned around looking in her direction. She then ran toward the laboratory, which was on the same floor level where the assault took place.

No formal plea of insanity at the time of commission of the offense was entered, but it is clearly apparent from the record,

from the evidence and the charge of the court that this was the intent of the defense and was accepted as such. There is a great deal of medical proof, pro and con, in the record which applies to defendant's sanity, and ability to differentiate right from wrong at the time of the commission of the offense.

At the beginning of defendant's proof certain stipulations of testimony were admitted which included the medical history and mental status record of defendant from the date of his admission to Central State Hospital on May 26th, 1966. The first report is dated July 28th, 1966, and is signed by J. Capers Jones, M.D., Staff Psychologist. The report contains a rather detailed history of testing and examination and concludes with the following diagnosis which is pertinent to this record:

> Diagnosis; Mental deficiency, mild to moderate with psychotic reaction versus schizophrenic reaction, chronic undifferentiated type, a person of borderline of intelligence. Stress, moderate. Predisposition, severe. Impairment, severe. The patient is believed to be mentally incompetent and incapable of advising his attorney at this time. Psychological tests are being performed to ascertain approximate intelligence level.

A second stipulated document is a report of psychiatric examination dated August 25th, 1966, which states as follows:

> "On May 26th, 1966, the above named person was admitted to the Maximum Security Unit, Central State Psychiatric Hospital by order of the Shelby County Criminal Court, Division II. He is here for observation and diagnosis as to his mental condition prior to his trial for assault with intent to rape. After observing the patient from the time of admission and doing the usual mental, psychological, physical and laboratory examinations, we, the undersigned staff members unanimously agree that he is insane at the present time. He shows evidence of a psychosis and has

during his entire stay here. We believe he does not know right from wrong and that he is incompentent to advise counsel in his own defense, therefore, we suggest commitment at this time. We, the undersigned, hereby certify that the above report is a true and correct statement of our findings with reference to Edward Richard. Respectfully submitted, J. Capers Jones, M.D., J. E. Morris, M.D., both staff psychiatrists."

A further medical document in the record is a staff conference report of the State of Tennessee, Department of Mental Health, dated July 29th, 1966.

"The patient's name, Edward Richard. Staff present, Drs. Jones, Schroeder, Morris. Psychologist, Mrs. Owensby. Social worker, Glenn Rogers. Aide, John Midgett. Supervisor, P. T. Hudgins. Interview finding; 39 year old colored male admitted 5/26/66. Charge, assault with intent to rape. Note; no spontaneity, vague and nebulous in his replies, below normal intelligence, no delusions or hallucinations, relevant and coherent at times, difficult for him to say "Methodist Episcopal". Has had antiluetic shots, denies enemies, no ideas of reference, denies any knowledge of crime, dull and stupid. Recommendations. Retain for further treatment, will review in six months if he shows some improvement. Diagnostic impression including stress, predisposition and impairment, schizophrenic reaction, chronic, undifferentiated type 22.5, stress, unknown. Predisposition, moderate. Impairment, severe. Signed by Dr. J. E. Morris, M.D., staff psychiatrist."

The next stipulated report, dated September 1st, 1966, includes this diagnosis:

"schizophrenic reaction chronic, undifferentiated type. Patient was seen by staff July 29th, 1966, and diagnosis reached by unanimous decision of staff. Discharge as incompetent, insane."

The final report by stipulation is dated May 17th, 1967, a staff conference report by Dr. Ersman Morris, psychologist, Mrs. Owensby; social worker, Glenn Rogers; aide, Mr. Miller:

Diagnostic impressions; "schizophrenic reaction, simple type; stress, unknown; predisposition, moderate; impairment, severe—incompetent. Signed by J. E. Morris, staff psychiatrist."

Dr. Frank Luton testified that he was Commissioner of Mental Health for the State of Tennessee. In 1966, he was Clinical Director of Central State Psychiatric Hospital in Nashville. Dr. Luton confirmed the contents of the records pertaining to defendant which had previously been admitted by stipulation, and stated, "If he had chronic schizophrenia at the time he came into the hospital, and didn't know the difference between right and wrong at that time, I would feel that he hadn't changed very much in the two months. This is a disease that doesn't change very much, however, I don't want to leave the impression that schizophrenia is a hopeless disease. It can be treated and according to the record here, the man did improve in the several years after he was readmitted to the hospital."

It is pertinent to insert here a series of questions and answers asked on cross-examination:

"Question: All right, sir, Dr. Luton, did you ever personally examine or interview the defendant, Edward Pete Richard—you cannot, in fact, tell this jury, can you, sir, that on March the 6th, 1966, that this man was criminally insane?

Answer: I think, as I said a while ago that if this man—I have been testifying all afternoon on basis of records, I said, if he had chronic differentiated schizophrenia on the date that he came into the hospital, then the chances are that he was insane at the time two months before that. That's all I can say."

Dr. Roger K. White was called in rebuttal and testified that he specialized in psychiatry and was Director of Forensic Psychiatry for the Tennessee Department of Mental Health, and had been since July 15th, 1969. That he first formally examined defendant on November 20th, 1969, on which date he was also serving as Supervisor of the Maximum Security Division of Central State Hospital. That in the course of an effort to make a general review of all cases in the hospital for staff determination, defendant was interviewed. It had been over two years since the last previous staff evaluation. After a review of his record, defendant was brought into the staff conference for an extensive interview, as the result of which it was concluded that he did not show evidence of such a degree of mental or emotional malfunction as would render him incapable of participating in a trial at that time. There was no evidence of residual schizophrenia at that time, however, he was on medication at that time. The medication was discontinued for approximately one month and defendant brought back before the staff on December 30th, 1969. As a result of this examination the diagnosis of chronic undifferentiated schizophrenia was deleted from the records and defendant was assigned a diagnosis of moderate mental retardation based on previously established intelligence score, competent to participate in his own defense, and it was so reported to the court. He was released from the hospital to the custody of the Shelby County Sheriff's Office on January 2nd, 1970. Dr. White testified that an individual of defendant's intelligence level could operate normally in society, retain gainful employment, and at the time of the examinations in November and December, he did not exhibit any traces of schizophrenia. He could not say with certainty whether or not defendant ever had been a schizophrenic. That orindarily you would find some residual evidence of schizophrenia had the individual previously been so afflicted. That there was no positive test for this mental disease and it was necessary to depend primarily on clinical examination which presented a vague picture of chronic undifferentiated schizophrenia. Dr.

White testified that, although he himself was not there in May, 1967, the hospital found defendant relevant and appropriate, that he showed usual emotional responses, and there was no evidence that he was hearing voices, but they thought he was still incompetent to return to court.

Dr. White further testified that he was not absolutely able to state that the 1966 diagnosis of chronic schizoprenia was incorrect, nor that on the information available in the record that defendant was sane under the McNaughton Rule on March the 6th of 1966.

At the previous sanity hearing in January, 1970, Dr. White testified that he considered Dr. J. Capers Jones and Dr. J. E. Morris competent and that he had no basis for disagreeing with any of the statements made by these physicians in the report of August, 1966.

A careful analysis of the entire record in this cause, including all of the evidence, and all of the medical proof, leads us to the unescapable conclusion that the evidence clearly preponderates in favor of defendant's legal insanity on March 6th, 1966, the purported date of the crime. On the other hand, upon a careful weighing of the evidence we are satisfied that the State has failed to carry the burden required of it to prove beyond a reasonable doubt defendant's sanity at the time of the commission of the offense.

For at least one hundred years the rule on this question in this State has been that to warrant a conviction, once the issue of insanity has been established, it must appear that the accused is capable, at the time of the crime, of distinguishing between good and evil, and had a consciousness of doing wrong. It is the duty of the State to prove all the essential elements on this issue beyond a reasonable doubt. (See *Dove v. State*, 50 Tenn. 348, p. 371.)

The positive proof in this case is that on May 23rd, 1966, a little more than two months after the assault occurred, the

trial court directed the transfer of defendant to Central State Hospital for mental examination upon a certification of two examining physicians. On August 25th, 1966, a unanimous staff report of psychiatric examination indicated evidence of a psychotic state which had existed from the date of his commitment. The doctors found defendant did not know right from wrong and was incompetent to advise counsel in his own defense. From that date forward there is evidence that defendant's condition gradually improved until in November, 1969, he was found competent to aid in his own defense. On January 12th, 1970 an order was entered finding the defendant competent to stand trial. The evidence is uncontradicted that defendant is a person of borderline intelligence. In September, 1966, when defendant was committed on his plea of present insanity, Dr. Frank Luton testified that he had examined the defendant personally. That the various tests and examinations to which defendant had been subjected required a diagnosis of schizophrenic reaction. That defendant was found to be both mentally deficient and psychotic. Dr. Luton expressed the opinion that if the condition existed on the date of admission to the hospital that he would feel that he hadn't changed very much in the two months prior thereto. He also noted an apparent improvement in the defendant in the dates between May 26th, 1966, and September 13th, 1966.

Dr. Roger White testified that his first formal contact with defendant was upon staff examination in November, 1969, at which time there was no evidence of residual schizophrenia. Defendant's medication was discontinued and on December 30th, it was concluded that he was of such a state of mind that he was competent to participate in his own defense. That he could not say with certainty that defendant had never been schizophrenic but that they expect to find some residual traces in such cases. At the time of one examination, the date of which is not stated, Dr. White testified that defendant did not know right from wrong. He further stated that frequently mental

patients improved under institutional environment. That he was not in a position to state on information available to him that defendant was sane under the McNaughton Rule on March 6th, 1966.

On the basis of all the evidence in this case, we are impelled to adopt the reasoning of the court in *Dove*, supra, as it applies here to the jury verdict. The evidence of the offense is clear if we assume that the defendant was of sound memory and discretion. Yet the jury returned a verdict fixing the minimum sentence for the offense charged. By scrutiny of the questions asked by some of the jurors, we are forced to the conclusion that the verdict of the jury was not in accord with the medical testimony offered. A careful evaluation of all the medical testimony sustains the finding that the evidence did not preponderate in favor of defendant's sanity beyond a reasonable doubt.

In *Stuart v. State*, 60 Tenn. 178, p. 188, in affirming a jury verdict and judgment on the same question involved here our Supreme Court had this to say while assessing the difference in quantum of proof required in a civil case as opposed to a criminal trial:

> "But in a case involving the life or liberty of the citizen, we cannot escape the responsibility. We cannot, in law or in conscience, affirm a judgment, when, after making all due allowance for the superior advantages of a jury, we can yet see that the jury were not warranted upon the facts in finding him guilty."

In *King v. State*, 91 Tenn. 617, p. 648, citing *Dove v. State*, supra, the court said:

> " 'The presumption of sanity stands for sufficient proof of sanity until the presumption is overturned. When the proof of insanity makes an equipoise, the presumption of sanity is neutralized; it is overturned; it ceases to weigh, and the jury are in reasonable doubt.' "

We have weighed the evidence carefully in this case and find it deficient to warrant the jury's verdict in view of all the proof on the question of defendant's ability to know right from wrong at the time of the commission of the offense. Assignment of Error No. III is sustained, which also disposes of Assignments I and II.

The IVth Assignment charges error to the trial court in allowing the in-court identification of defendant by Pamela Sue Taylor on the premise that she had no independent recollection that the defendant was the person who attacked her, and that her in-court identification was based on statements by a police officer to the effect that she had identified defendant's voice during the course of an improperly held confrontation at the police station, and the fact that immediately preceding the trial she had seen only one of two photographs she had picked out some years before, that being a picture of defendant.

This Assignment is without merit and it is not borne out by the record. The witness testified she was sure in her own mind defendant was the same man she had seen in the hospital. She had identified the voice of defendant at the police station without viewing the speaker. We think the fact that she was shown only the defendant's picture prior to trial is immaterial. The trial court made an extensive investigation out of the presence of the jury based on the totality of the circumstances of the identification in accordance with the United States Supreme Court ruling in *Simmons v. United States*, 390 U.S. 385, 88 S.Ct. 967. As stated in *Simmons*, supra, even though the identification procedure employed may have in some respects fallen short of the ideal, we hold that in the factual surroundings of this case, the identification procedure used was not such as to deny this defendant due process of law or to call for reversal under our supervisory authority.

The VIth Assignment is without merit. While the remarks attributed to State's counsel may have exceeded the bounds of

propriety, we think there was no prejudice to defendant in view of the court's exclusion of the remarks and at the most it was harmless error (TCA Sec. 27-117). The VIth Assignment also complains of the court putting questions to the State witnesses in the presence of the jury. There is no reference to the parts of the Bill of Exception to indicate the particular action complained of. We have read this entire record and find numerous places where questions were put by the court. We consider these to be proper in the administration of the conduct of the trial and in no way prejudicial to the defendant.

The VIIth Assignment charges error to the trial court in overruling defendant's motion for a mistrial based on the fact that the State's attorney, in closing argument read part of the Central State Hospital report, not part of the record, showing defendant had been accused of other attempted rapes. Again this Assignment does not contain a reference to the pages of the record where this ruling of the court purportedly occurred, in accordance with Rule 14 of this Court. We have repeatedly read the charge. The error complained of is not in the record. The Assignment is overruled.

We note that the judgment of the trial court does not conform to the requirements of TCA Sec. 40-3102, regarding credit for time served in accordance with *Marsh v. Henderson*, 221 Tenn. 42, 424 S.W.2d 193.

All matters having been considered, the cause is reversed and remanded for the reasons set forth in this opinion.

/s/ CHARLES H. O'BRIEN, Judge

Concur:

/s/ MARK A. WALKER, Presiding Judge
/s/ WILLIAM S. RUSSELL, Judge

Attest
A True Copy
Jewel Redden, Clerk
/s/ Jewel Redden

APPENDIX L

The Court of Criminal Appeals of Tennessee
At Jackson

December, 1971

Appeal From the Criminal Court of Shelby County
Honorable William H. Williams, Judge

Benjamin A. Butterworth,
Plaintiff in Error,
vs.
State of Tennessee,
Defendant in Error.

No. 6
Shelby County.

For Plaintiff in Error:

Hal Gerber, Memphis, Tennessee

Frank Crawford, Memphis, Tennessee

For Defendant in Error:

David M. Pack, Attorney General, Nashville, Tennessee

Robert H. Roberts, Assistant Attorney General, Nashville, Tennessee

J. Clyde Mason and Michael Hughes, Assistant District Attorneys General, Memphis, Tennessee

Judgment Reversed and Remanded (as Modified)

Opinion by Judge Charles Galbreath
Filed: Feb. 11, 1972

OPINION

This is an appeal from the Criminal Court of Shelby County where the plaintiff in error was adjudged guilty of first degree murder, assault with intent to commit first degree murder, and carrying a pistol for the purpose of going armed. All of the assignments of error challenge the sufficiency of the evidence and the court's instructions on the weight to be given it.

The tragic facts leading up to and surrounding the killing of a friend and the attempt to kill his wife by the defendant below are without material dispute. After many months of fruitless correspondence between the estranged couple, the defendant returned home from his military post of duty in South Viet Nam and learned that his wife was engaged in an affair with the victim, and upon finding them in bed together he shot and killed the man and wounded his wife.

The defense was temporary insanity produced by the emotional upheaval described by the career Marine father of four as he opened a door into the bedroom in his neighbor and friend's home and saw the couple in bed together. Three scientists, two of them psychiatrists and one a clinical psychologist, testified at length that they had examined and tested the defendant, and all gave as their expert opinions that at the time of the shooting the defendant was suffering from such mental stress that he was rendered temporarily psychotic so as to be unable to distinguish between right and wrong. It is the counter contention of the State that the actions of the defendant before and after the shooting, including his entering the door of the bedroom with a pistol in his hand, and the subsequent flight and pre-arrest arrangements made by the defendant for legal and medical assistance negates any form of mental incapacitation.

If the theory of the defendant is correct, then he would not be guilty of criminal misconduct in shooting his wife and her

lover under the circumstances described; for as our Supreme Court has said, "the capacity to know right from wrong, and to know that the particular act being committed is wrong, is recognized as a correct rule in Tennessee, to test the question of criminal responsibility." See *Watson v. State*, 133 Tenn. 198, 180 S.W. 168. On the other hand, if the State is correct and the defendant did seek out his victims with the intent to destroy them after considering what he was about to do and the consequences of such behaviour, then his actions would be criminal.

We are thus confronted, as was the jury and Court below, with a pure question of fact as regards the issue of insanity. As has often been stated in various ways by our appellate courts:

> "In this Court, the burden is upon the plaintiff in error to show his innocence by a preponderance of the evidence. By the verdict of the jury, approved by the trial judge, the presumption of his innocence has been removed and converted into an adjudication of his guilt. Therefore, the inquiry here is not whether he is guilty, and the investigation of the record is not made with that in view. But the question is, Is he innocent? and the record is investigated upon an assumption of his guilt. Immaterial conflicts in the testimony of witnesses are not considered. Discrepancies . . . which are not controlling in their materiality, are disregarded. In many cases, the mere weight to be given to the testimony of witnesses, arising out of their number and general reputation is disregarded because these questions are all deemed to have been settled by the jury and trial judge, who saw them upon the stand."
>
> *Mahon v. State*, 127 Tenn. 535, 156 S.W. 458.

Applying the above rule to this case and the proof in the record before us we are struck by the fact that there was ac-

tually no proof offered in rebuttal of the three medical experts who all testified that the defendant was insane at the time of the alleged crimes and thus corroborated the defendant's own testimony that when he saw his wife in bed with another man he was shocked to such an extent that everything seemed weird and unreal and that he was not conscious of the fact that he was shooting them until it was done.

No reason is suggested for the medical authorities to have deliberately testified falsely as to their observations and findings. No medical proof to the contrary was offered by the State. Indeed, as aforesaid, no proof at all was offered to counter that of the experts on the very issue that was determinative in this case. As the trial judge charged the jury in this case, and as every trial judge charges juries in all cases involving the testimony of witnesses on factual matters:

> "If there are any conflicts in the statements of the different witnesses, it is your duty to reconcile them if you can, for *the law presumes that every witness has sworn to the truth*."

Our Supreme Court has long recognized the rule that appellate courts will not permit testimony to be discarded or disregarded arbitrarily or capriciously. *Frank v. Wright*, 140 Tenn. 535, 205 S W 434. Particularly is this true when the testimony offered is that of a witness with no interest in the outcome of the case. See *Poole v. First National Bank*, 29 Tenn. Apps. 327, 196 S W 2d 563. A later enunciation of this rule is found in the unqualified language employed by the late Chief Justice Neil in speaking for an unanimous Court, "In no case is the jury privileged to arbitrarily disregard the testimony of any witness." *Marie v. State*, 204 Tenn. 197, 319 S W 2d 86.

While reluctant to disturb the findings of a trial jury approved by the judge on a question of fact, it is our duty to do so when it is clear that the verdict is preponderated against by

the evidence. While recognizing the great weight we must accord the verdict of a jury, we cannot permit a verdict to stand if the weight of the evidence is against it. As pointed out by our Supreme Court:

> "The verdict of a jury is entitled to weight, it removes the presumption of the prisoner's innocence; we must, beyond doubt, recognize the superior advantages possessed by the jury and Judge below, in seeing and hearing the witnesses and a full examination of the case, and they can judge better of the credibility of witnesses; making due allowance for all this, however, shall we give the same effect to the verdict of a jury by which a person is sentenced to death that we would where it simply settles the title to a horse or cow? Without hesitation we say no.
>
> * * * * * * *
>
> "But in a case involving the life or liberty of the citizen, we cannot escape the responsibility. We cannot, in law or in conscience affirm a judgment, when, after making all due allowance for the superior advantages of a jury, we can yet see that the jury were not warranted upon the facts in finding him guilty."
>
> *Stuart v. State*, 60 Tenn. 178.

Even if the accounts of the lay witnesses to the effect that the defendant exhibited a calm and unimpassioned manner before, during, and after the incident causing the death and wounding of the victims be considered as evidence suggesting sanity at the time of the commission of the crime as urged upon us by the State relying primarily on the opinion of our Supreme Court in *Mullendore v. State*, 183 Tenn. 537, 194 S W 2d 332, it is clear that in this case, unlike in *Mullendore*, the overwhelming weight of the evidence on the issue is to the effect that at the time of the shootings Sgt. Butterworth was not possessed of that degree of rationality so as to meet the test of sanity. He has thus carried the burden of demonstrating here his innocence,

and we have no alternative but to reverse the convictions for murder in the first degree and attempted murder in the first degree and remand for a new trial.

The defendant admitted that he had armed himself with the pistol later used to shoot the victims for the purpose of shooting himself, but after considering the effects such action would have on his children abandoned the idea, at least for the time, of ending his life. There appears no question but that he was thus carrying a weapon for the purpose of going armed prior to becoming psychotic, and the conviction and fine for this offense is affirmed. If he had not been in possession of the pistol at the time he discovered the lovers in flagrante delicto, it would have been difficult for his anger and resentment to have been translated into the tragedy that spontaneously occurred. The purpose of the statute proscribing the carrying of such weapons is to inhibit the opportunity and temptation to use them unlawfully.

The writer is in agreement with the views expressed in the concurring opinion of our special brother Templeton to the effect that, the issue of sanity aside, the facts in this case do not support a higher grade of homicide than voluntary manslaughter.

It results that such portion of the judgment fixing punishment at 20 years and 1 day for murder in the first degree and at 3 years for assault with intent to commit murder in the first degree is reversed, and new trials are granted on the lesser included offenses of voluntary manslaughter and the attempt to commit voluntary manslaughter; and that portion of the judgment ordering the defendant to pay a fine of $50 together with the costs for carrying a pistol is affirmed.

/s/ CHARLES GALBREATH, Judge

Attest
A True Copy
Jewel Redden, Clerk
/s/ Jewel Redden

The Court of Criminal Appeals of Tennessee at Jackson

December, 1971

Appeal From the Criminal Court of Shelby County
Honorable William H. Williams, Judge

Benjamin A. Butterworth
Plaintiff-in-Error
vs.
State of Tennessee
Defendant-in-Error
No. 6
Shelby County

SEPARATE CONCURRING OPINION

(Filed February 11, 1972)

I think the defendant's crimes are of the grade of voluntary manslaughter and, finding no other error, would fix his sentences at the minimum provided by law or remand for the jury to fix them depending on whether the State agreed. Judge Galbreath would reverse and remand for a new trial and Judge Mitchell would affirm. I am not prepared to accept Judge Galbreath's conclusion that the evidence preponderates against the finding that the defendant was sane when he fired the shots but I think the result he arrives at is just and I concur in it. It takes a majority of us to decide a thing and no useful purpose is served by a "unanimous dissent". I will not go into the various assignments of error and will undertake only to state my views on two propositions.

First, I do not regard the discarding of the expert testimony that the defendant was insane as arbitrary and capricious and

do not believe the State was bound to counter it with other expert testimony in order to prevail. It is true that progress has been made in the medical discipline that deals with the human mind and emotions but it is still in its infancy. Opinions of experts in this field that the prisoner was sane or insane at a time when they were not present and observing him may need our cautionary instruction more than the opinions of any other experts on any other subjects. The force of their opinions is further dissipated by the nature of our McNaughten rule itself, that if a defendant has capacity and reason to enable him to distinguish the difference between right and wrong as to the particular act he is then doing he is criminally responsible for such act. This is because the rule involves matters not purely scientific. Generally the expert in this field will qualify his opinion on the ground that the conception of what is right and wrong and the ability to distinguish between the two varies among individuals and the inquiry is, therefore, more moral and theological than medical. When an imprecise science is used to see if the condition of the human mind meets an imprecise legal standard the answer likely will be imprecise.

I have no doubt that Sergeant Butterworth labored under great stress. His condition might have seemed weird and unreal, which is common when one is caught up in a catastrophe, and his consciousness might have been dulled but I think he knew what he was doing was wrong. His intelligence, his successful career in the military, the absence of mental disease, and the remarkable efficiency with which he acted and fled show that he met that test. Of course, the jury could look to these things and was not obliged to accept the opinion of the experts. *Mullendore v. State*, 183 Tenn. 53, 191 S.W. 2d 149 (1945). I do not believe the evidence preponderates against the finding of sanity.

Second, I think the crimes are of the grade of voluntary manslaughter, not murder, because committed under the influence

of passion and provocation. My colleagues have related the facts I think demonstrate the existence of these conditions and I will not go over them again. The elements of murder and manslaughter have been discussed many times by our courts. One of the best appears in *Rader v. State*, 73 Tenn. 610, 619 (1880).

". . . When the murder is not committed in the perpetration of, or attempt to perpetrate, any of the felonies named . . . then, in order to constitute murder in the first degree, it must be perpetrated by poison or lying in wait, or some other kind of willful, deliberate, malicious and premeditated killing; that is to say, the deliberation and premeditation must be akin to the deliberation and premeditation manifested where the murder is by poison or lying in wait—the cool purpose must be formed and the deliberate intention conceived in the mind, in the absence of passion, to take the life of the person slain. Murder by poison and lying in wait, are given as instances of this sort of deliberate and premeditated killing, and in such cases no other evidence of the deliberation and premeditation is required; but where the murder is by other means, proof of deliberation and premeditation is required. It is true it has been held several times that the purpose need not be deliberated upon any particular length of time—it is enough if it precede the act; but in all such cases the purpose made be cooly formed, and not in passion, or, if formed in passion, it must be executed after the passion has had time to subside. As was clearly pointed out by the circuit judge, if there was provocation of a sufficient character, and the killing was under passion thus excited, it would be manslaughter. But it is not every provocation that will reduce the killing to manslaughter, not even blows under all circumstances, for the resentment must bear a reasonable proportion to the provocation. Nevertheless, although there be no sufficient provocation to reduce the killing to manslaughter, still there may be such provocation as to excite passion in fact, and if the purpose to kill is formed in passion thus excited, and executed

without time for the passion to cool, it is not murder in the first degree, but murder in the second degree".

The nature of the passion under provocation spoken of is described in another case.

"It is not necessary to reduce the killing to manslaughter that the passion should be so great as to render the defendant incapable of deliberation or premeditation. If the circumstances be such as are calculated to produce such excitement and passion as would obscure the reason of an ordinary man and induce him, under such excitement and passion, to strike the blow that causes the death of the deceased, this will reduce the killing to manslaughter." *Toler v. State*, 152 Tenn. 1, 13, 200 S.W. 134 (1923).

An adequate provocation is said to be, "a provocation of such a character as would, in the mind of an average reasonable man, stir resentment likely to cause violence, obscuring the reason, and leading to action from passion rather than judgment." *Freddo v. State*, 127 Tenn. 376, 382, 155 S.W. 170 (1912).

The illicit relationship of a spouse and another is adequate provocation to reduce the homicide to voluntary manslaughter.

"We are of the opinion that if, as a matter of fact, the deceased had debauched the wife of plaintiff in error, and the plaintiff in error had been apprised of that fact and had become convinced of its truth on the day of the wedding or thereafter, and, with reasonable expedition, while under the influence of passion and agitation produced by such information, had killed Noe, he would only have been guilty of voluntary manslaughter." *Davis v. State*, 161 Tenn. 23, 25, 28 S.W. 2d 993 (1930).

I do not believe the use of a deadly weapon supplied the elements of murder. Our courts have not hesitated to hold that the presumptions raised by the use of a deadly weapon are over-

come by other facts and circumstances in a proper case. *Cooper v. State*, 210 Tenn. 63, 356 S.W. 2d 405 (1962); *Smith v. State*, 212 Tenn. 10, 370 S.W. 2d 543 (1963).

I am unimpressed by the suggestion that the passion engendered had time to cool. Counting from the time the first insult was inflicted overlooks the fact that the provocation continued unabated up until the tragedy. The elapse of about 16 days during which Sergeant Butterworth knew of the illicit relationship but did not actually see it going on served only to further provoke and inflame him, not to cool him down.

In *Drye v. State*, 181 Tenn. 637, 184 S.W. 2d 10 (1944), the wife's morals were about as low as Mrs. Butterworth's and her husband knew about it over a long period of time. Responding to a particular incident touching her infidelity, he rode a bus from one city to another, procured a pistol and with threats against her and her paramour sought her out and shot her to death. The crime was voluntary manslaughter. The Court said:

". . . That his actions in procuring the weapon and seeking out his wife appeared deliberate and determined, is not persuasive that his passion had cooled. Suppressed anger is a common accompaniment of passion, the deepest and most powerful emotion, and of a determination beyond control to carry through a design formed in passion. Nor is the fact that he was relatively calm after the event inconsistent . . ."

In *Whitsett v. State*, 201 Tenn. 317, 299 S.W. 2d 2 (1957), the defendant over a period of eight months had reasons to believe his wife was having an illicit relationship with another man. The information would have convinced any ordinary reasonable man of her infidelity but he retained a doubt. On receiving fresh information of the same kind he had received before and upon immediately thereafter seeing his wife and her paramour riding in a vehicle together he pursued them and killed the paramour

with blasts from a shotgun then bent the barrel over his head after he fell. The crime was manslaughter.

I am satisfied that Sergeant Butterworth committed the crimes under passion that had not had time to cool and on adequate provocation to mitigate them to voluntary manslaughter and assault with intent to commit voluntary manslaughter. But as I said before, Judge Galbreath would reverse and remand for a new trial and believing that his disposition of the cases is just I concur with the learned Judge. And I concur in his opinion on the pistol conviction.

/s/ JOHN D. TEMPLETON
Special Judge
Attest
A True Copy
Jewel Redden, Clerk
/s JEWEL REDDEN

APPENDIX M

I think we will after we conclude this witness.

The Court: All right. Then we will need to get ready for argument.

Mr. Richardson: Yes, and we would need a recess. It might be better, if the Court pleases, to go ahead.

The Court: Yes. Suppose we stay. Bring the jury in.

(Thereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: General, you may proceed.

Mr. Richardson:

Mrs. Owensby, would you again state your name to the jury, please?

My name is Nona Owensby.

Mrs. Owensby, what official position do you hold?

I am division psychologist of Forensic Services Division at Central State Hospital.

Located where?

Nashville, Tennessee.

Q. Would you give a brief statement concerning your education and experience? A. I have a Bachelor of Art Degree from Trevecca College, a Master's Degree from Vanderbilt, further graduate study at Peabody College, and all the requirements for the Ph. D. at Vanderbilt except for the completion of the dissertation.

I am licensed as a psychologist examiner by the State of Tennessee. I belong to the American Psychological Association, the Tennessee Psychological Association, and I have worked for

the last nine and a half years at Forensic Services Division, which is the institution for evaluating male criminals.

Q. Mrs. Owensby, did you examine Mr. George Edwards? A. Yes, I did.

Q. Do you see him in the courtroom today? A. Yes.

Q. Will you point him out, please, ma'am? A. Yes, the gentleman in the green suit.

Mr. Richardson: Let the record reflect the witness identified the defendant.

The Court: Very well, sir.

By Mr. Richardson:

Q. Was Mr. Edwards admitted to your institution for examination? A. Yes. He was admitted on September 26, 1972.

Q. And when was he discharged? A. On October 26, 1972.

Q. While there did you have contact with Mr. Edwards? A. Yes.

Q. Would you just explain the nature of contact you had with him? A. Several times some of these were individual interviews with him, some of them were in groups of various kinds, or there was supervision of psychological tests that were given to him, and I observed him in the hospital everyday routine.

Q. During this period of time was Dr. Fidelholtz away from the institution for a brief period? A. Yes, he was away part of this time when he was not there.

Q. Now, Dr. Fidelholtz, what is his official position? A. His official title is assistant superintendent of Forensic Psychiatry. He acts in fact as director of our division.

Q. All right. Did you obtain from the state and the defense certain reports and records concerning the background of the

Defendant Edwards? A. This—I will answer that—this was sent to our hospital and it is all contained in his central records, and I did have access to this material, yes.

Q. Did you read it and study it? A. Yes, I did.

Q. I will ask you, please, ma'am, as a result of Mr. Edwards' stay at your institution and the study that you have just testified to, did you form an opinion as to whether Mr. Edwards knew the difference between right and wrong when he shot and killed his sister on June 7, 1972? A. Yes.

Q. And what is your opinion? A. My opinion is that he didn't—that he did know right from wrong at that time.

Q. Would you give briefly some of your conversations with him what, among other things, what caused you to arrive at this decision? A. You say just from my conversations or anything?

Q. Well, both and also the records. A. He talked an awful lot about what kind of opinion would be decided about his mental condition at the time of the crime and about various consequences, or various kinds of decisions, and about, you know, which would be to his best advantage, this kind of thing, and he talked in a very knowledgeable manner about some of the symptoms that other people had said that they had seen such as inappropriate smiling.

Q. What did he say about that? A. Well, he said:

> "You realize that I was smiling inappropriately at the time that I was arrested.",

or something of this sort.

So it was that and, of course, he told me at the time that he did not feel he needed any psychiatric treatment or that he ever did except for blackouts which were associated with drinking and his marriage problems, and he did not feel that he really ever had any mental illness, but he did quote from other people

who had told him that they considered that he had schizophrenia or temporary insanity, this sort of thing.

Q. Did he discuss the effects of him being found guilty of one of those different types? A. Yes.

Q. What did he say about that, please, ma'am? A. Well, he talked. This did not come out spontaneously. It took a period of time. He talked about that if it were temporary insanity then he would have to be set free. If it were decided—well, by temporary insanity associated with blackouts. I mean this is the way he felt. Or if it were, say, "schizophrenia" then they would probably find him not guilty by reason of insanity and send him to our hospital for a very short period of time, a few days even, or that this would be—he naturally did not like the idea of being sent to us for a lengthy period of time, and so we discussed something about whether he felt that there was any need for psychiatric treatment or ever had been, and he says he did not and so there was this.

And, of course, in the psychological testing there was nothing that I picked up on to indicate any sort of psychotic process at the time or any underlaying process. There was quite a bit that would point to the fact that this person is somewhat of a manipulator, passive, aggressive, or probably had some difficulty in handling anger appropriately, and things of this sort.

So this had something to do with my opinion.

The thing that had been reported from the social history as evidence of the fact that family members had felt that he was mentally ill——

Mr. Burch: If Your Honor please, I object to what other staff members felt about it.

The Court: All right, sir. I believe she said family members, Mr. Burch.

Mr. Burch: I am sorry. I thought she said staff members.

The Court: Did you say family members?

The Witness: Family members, yes.

The Court: All right.

A. (Continuing) These things impressed me as being no different from the kinds of things that family members say about persons in their family who are troublesome in their behavior, you know, and they say:

"Oh, he must be sick."

And, of course, it all fits with what we call as kind of a personality problem he had.

Q. And what was your diagnosis? A. My diagnosis was schizoid personality and alcohol addiction.

There is one other thing that I did have access to that helped me in my opinion. That was a statement to the police within an hour after the crime when he told exactly what he did and told how he felt about it, and this sort of thing, which did not seem to be a statement of a man who did not know what he was doing.

Q. Did you give him the Wexler Adult Intelligence Scale Test? A. Yes, I did.

Q. And what was the reading? A. I mean the young lady student gave it and I interpreted it.

His score, 126, verbal IQ; 107, performance; 119, full scale.

Q. Could you give the average range of the average person, the full scale IQ? A. What is considered average of normal is between 90 and 110.

This patient scored at what we call bright knowledge level and, by the way, this correlates very highly with the score that Dr. Battle received when he tested him.

Q. Did he give any expression of remorse or regret about the death of his sister? A. He verbalized regret but I could not detect there was any emotional component to it.

Mr. Richardson: Indulge me just a moment, please, Your Honor.

The Court: Yes, sir.

Mr. Richardson: You may cross-examine, please.

Cross-Examination

By Mr. Burch

Q. Mrs. Owensby, you said you interviewed him several times. Would you look at your records there and tell us how many times? A. I don't have that as a matter of record, Mr. Burch.

Q. You mean when you would interview a man to form a conclusion, you made no notes? A. No. I make a final report whenever I——

Q. Well, have you any final reports that will tell us whether you saw this man two times, three times, five times? A. I can tell you it is more like five or six.

Q. You saw him about five or six times, your best estimate? A. Yes.

Q. Under what circumstances? A. Well, some of these were individual interviews in the office, my office there.

Q. How many of those? A. About four.

Q. About four in your office? A. Uh-huh.

Q. And the other one was what, watching him wander around the halls? A. No. We had some of the staff members see a patient immediately after admission for a short interview. That is one of them. Another was observation of the testing that was given him by the psychology student.

Q. I am asking about you, about your observation of him? A. All right. I was there. I was observing on that testing inter-

view. The other was in the staff, as a member of the staff. That would be a total of six.

Q. Now, is it part of your training and understanding of nervous disorders that they are fluctuating in that they have ranges of intensity from a state of almost remission to great exacerbation? A. This sometimes occurs, yes.

Q. Now, is it also a part of your knowledge, as reflected by that file, and this is a supposition on my part because I haven't seen it, that all the time you had him up there that he was on thorazine? A. I can check that and let you know.

Q. Well, before you check it, do you remember whether this man was on thorazine the whole time he was up there? A. No, I do not medicate them.

Q. As a matter of fact, you can't prescribe anything, can you?

Mr. Patterson: May it please the Court, I would like for her to be permitted to answer.

Mr. Burch is welcome to her file if he would like to have it.

The Court: All right.

By Mr. Burch

Q. Take your time, Mrs. Owensby. A. He was prescribed thorazine on the day after admission and, as the record shows, this continued throughout his hospitalization.

Q. Now, although you don't prescribe drugs, are you familiar with drugs to know what thorazine is? A. I know, yes. I have a pretty good idea what thorazine is.

Q. Well, would you call thorazine, according to the detail or the physician's desk book on the subject, a strong antipsychotic drug, a major tranquilizer? A. Yes.

Q. And though you say this man had nothing but a personality disorder, he was on a strong antipsychotic drug and a major

tranquilizer all this period that he was up there and subject to that drug when all these observations were made? A. Yes.

Q. That is true, isn't it? A. That is true.

Q. Now, you say that he was manipulative. If we assume that this thorazine did its intended work and that the man was in a very sheltered environment, to-wit: a mental hospital, does it strike you as remarkable that he might begin to think, as any person might begin to think, as to what the consequences of their situation are? A. Mr. Burch, I don't think anyone would say that thorazine or any other tranquilizer is a cure, and there is some of the tests that I gave him, say, for instance, the Minnesota Multiphasic Personality Inventory, which is a self-exploratory questionnaire true-false of four hundred and something items which taps on to symptomatic behavior.

This man came out clean except very high on the psychopathic deviate scale.

Now, thorazine doesn't make that.

Q. What is thorazine and why is it given? A. It relieves anxiety. It may stop hallucinations, and things of this sort.

Q. And that is why it is prescribed, isn't it?

And if it had any effect, the intended effect, it had that effect during the whole period that the man was up there in a mental hospital and taking thorazine, didn't it? A. No, I wouldn't say an unqualified yes to that. I don't think it would.

Q. Very well. A. I did see him the day that he was prescribed the thorazine when it had not had a chance for an effect, and he looked pretty good then. But, of course, I recognized that he had been under psychiatric treatment and had effects of other psychotic medication.

Q. Well, is it part of your information and is it evidenced by a letter from Dr. Parks Walker in that file that when medication was withdrawn in the Detention Unit here that he became psychotic, that he heard noises coming through the vents, that he

imagined helicopters flying around, heard his sister's horn blowing and set the beds on fire? A. We have that in our records, yes.

Q. And is that why you put him on the medication? A. I did not put him on medication.

Q. Well, that he was put on medication? A. I don't know why it was he was put on that.

Q. Well, who would know about that? A. I suppose that Dr. Morris would know.

Q. Now, you say he was manipulative, certainly not successfully manipulative. These simplistic things that you have given us the example of certainly would have no effect on a trained observer like yourself, would they? A. I don't understand your question.

Q. I mean is the man—— A. You mean that I would see the manipulation?

Q. You perceived it instantly, didn't you? A. No. I mentioned that in my report that it took some time but there were enough cues there that I persisted to find it.

Q. You unraveled it then in these interviews that you have told us about? A. Well, I might say that that is supposed to be our business.

Q. Now, do you find that it is or not unusual for people who are suffering from mental disease to assert and insist that they are all right? A. No. This does happen, yes.

Q. It does happen? A. Yes, it does happen.

Q. Somebody can say he is Napoleon but still insists that he is perfectly normal, can't he? A. That's right.

Q. So that you attach no clinical value to the fact that the man insisted that he was perfectly all right, did you? A. If it were just that statement by itself, but I have other evidence, like the psychological tests, you know, he could not simulate.

Q. Is it part of your knowledge and history in this case that before this man got in any trouble at all, before he had any motive to falsify, that he went through a long deteriorating period in which he had periods of withdrawal, that he became sadistic, that he had inappropriate responses to situations manifested in numerous ways, that it was so noticeable that his minister suggested that the psychiatrist come in, that a psychiatrist did come in, that a psychiatrist kept him under medication and observation, and that this went on for months, and that there was a firm diagnosis of schizophrenia by a licensed Board certified psychiatrist made before any of the events that brought us to this courtroom?

Is that a part of your knowledge and history? A. I am aware that this went on. I am a little confused about the diagnosis you got. As I understand it, I believe that the psychiatrist was saying something about a manic-depressive.

Q. Where did you get that information? Haven't you got Dr. Fidelholtz'—correction—Dr. Aivazian's report and doctor—— A. This report was made——

Q. Just a moment, please, ma'am.

Mr. Patterson: Your Honor, I think she is entitled to answer the question before Mr. Burch goes forward with his question.

The Court: Well, he had not finished the question, I don't think.

Mr. Burch: I had not finished the question.

By Mr. Burch

Q. Haven't you got there in that file the report of Dr. Aivazian and Dr. Walker, which I personally sent to that hospital, which goes in at great length to their treatment, their findings, the family history? A. This report was dated—yes, it is signed by both of the doctors, and it is dated August 23rd.

Now, it's my understanding, at least it seems to be, that Dr. Aivazian did not know him at all until after the event. He does

say that from November 4 of '71 to date he had been under the care of Dr. Walker.

Now, as far as a definite diagnosis that Dr. Walker had made prior to the crime, I don't believe that is a matter of our records.

Q. Madam, while you have that open there, if you will call my attention to the point where you say there was a diagnosis of manic-depressive, well, call it to the attention of the Court and jury and to me, please, ma'am? A. Well, I don't see it here.

Q. It is not there, is it? A. No, but the word come to me and I cannot tell you how.

Q. The word came to you? A. Uh-huh, that's right.

Q. Well, I can't ask you if you don't know how it got to you, but it is in clear black and white that the diagnosis here is schizophrenia, chronic, schizo-affective type. That was the diagnosis set out in black and white over the signature of both the psychiatrists, is it not? A. Dated August 23rd.

Q. August 23rd. And that was part of your knowledge? A. That was part of my knowledge.

Q. All the time that you had this up there? A. Uh-huh.

Q. Now, Dr. Fidelholtz, who is he? A. He is director of Forensic Services Division.

Q. Dr. Fidelholtz is a qualified physician, is he not? A. Yes, he is.

Q. And he is chief of the Forensic Services, is he not? A. Yes.

Q. And you don't——

Mr. Patterson: I would object to what Dr. Fidelholtz may or may not say about this particular case and I so informed the Court as to the availability of Dr. Fidelholtz to Mr. Burch.

Mr. Burch: If Your Honor please, I have a right to cross-examine any expert witness about the opinion of another ex-

pert if they recognize them as an expert. I have certain writings of Dr. Fidelholtz that I am going to ask this lady about.

The Court: All right, sir. I believe she is being offered as an expert and I believe that's right, General, in the light of that, it is not hearsay. He is going to see if she knows Dr. Fidelholtz, and so forth, and I believe he is cross-examining her along those lines.

By Mr. Burch

Q. Now, can you tell me whether or not your opinion would coincide or be at variance with the opinion of Dr. Fidelholtz, who testified in this Court under oath on November 2, 1972:

"Question: As I understand"—this is page eight—you haven't got a copy?

Mr. Patterson: We don't have a copy of this, may it please the Court.

Mr. Burch: You are welcome to read it over my shoulder.

By Mr. Burch

Q. "Question: As I understand your testimony, on October 20th you had an individual in which there was a concensus of opinion that he was then suffering with a paranoid personality difficulty on which there was superimposed the problem of episodic excessive drinking.

"Answer: That's right, sir.

"Question: That was your diagnosis?

"Answer: That's right, sir.

"Question: He was not then psychotic, and in the opinion of yourself and your staff he was able to stand trial?

"Answer: That was our opinion, sir.

"Question: You do not have an opinion, nor did your staff express an opinion as to whether or not he was psychotic on June 7th preceding?

"Answer: No, sir.

"Question: Now, Doctor, is it within your knowledge that for some time prior to June 7, 1972, that the patient had been under observation and therapy by a psychiatrist; namely Dr. Parks Walker?

"Answer: Yes, sir.

"Question: And immediately following June 7th, that he began to undergo observation and therapy from a Dr. Aivazian?

"Answer: Yes, sir.

"Question: And the time you saw him and the time you reached your conclusion on October the 20th, he had had approximately four months of therapy and having been a member of a sheltered population; that is, he had been in the hospital in jail, hadn't he?

"Answer: Yes, sir.

"Question: Now, with reference to his condition on June 7th, state whether or not Dr. Aivazian and Dr. Walker would have a superior diagnostic opportunity to evaluate him as of June 7th? I am not asking about June 20th.

"Answer: They would be in a better position to evaluate his condition at that time, having seen him, than we would at a later time."

Now, do you disagree with any of that testimony of Dr. Fidelholtz? A. Yes, sir.

Q. What part, please, ma'am? A. Well, he was in error about no members of his staff having an opinion, and I think it was just an oversight and I think you will have to agree that people are fallible, and he would tell you, I think, that it is just an oversight on that point.

Q. Maybe they are. Maybe I am. Didn't you tell me yourself over the telephone and didn't you read me from a note that you did not have an opinion, that you only had a question? A. I will read to you what I wrote.

Q. Well, answer my question, please, ma'am, and then if it is at variance with my recollection, read me your note. A. I said in my report up there which I read to you, that I had a serious question whether or not this man ever had a psychotic period.

Q. Now, just read your note, please, ma'am, and state exactly what the note says? A. "I don't think he is psychotic now, and his very clever manipulative possibilities of his insanity defense make me question any previous psychotic episode."

Q. And this question is now an opinion? A. Yes.

Q. And the date of that note was what? A. 13th of October.

Q. 13th of October, and the shooting was on June the 7th, and since that time he had been a large part of the time with you under the influence of thorazine? A. Can I make a comment about this?

Q. Indeed you may, yes, ma'am. A. All right. I think the fact that the Court sent him to us for further evaluation on these questions shows that some people were not willing to take that previous study alone, I mean that it needed some further study, and this is what we do.

Q. Is that all, please, ma'am? A. Yes, sir.

Q. Now, I want to read you something else from—did you see a letter, or perhaps you wrote it, that went out over the signature of C. Richard Treadway, MD, Commissioner of Mental Health, on May 16, 1972, to the Honorable John L. McClelland. A. I don't know what you are referring to.

Q. It was a letter that was sent out by the State of Tennessee, Department of Mental Health, Cordell Hull Building, Nashville, Tennessee, to Senator McClelland, who was then holding some hearings about a mental health bill.

Mr. Richardson: If the Court please, may we see the document?

The Court: Yes.

Mr. Burch: Sure. Refresh you about Dr. Fidelholtz. That is Dr. Fidelholtz' opinion to the Bar Association here. I am going to ask her about that.

Mr. Patterson: May it please the Court, regardless of what this letter from Treadway to McClelland contains, I do not see the materiality to ask this particular lady concerning her opinion now, and I will object.

The Court: I agree, General. I fail to see where it is——

Mr. Burch: If Your Honor please—excuse me——

The Court: This is a letter of Dr. Treadway to a senator?

Mr. Burch: This is the head of the Department of Mental Health of the State of Tennessee stating a matter which has to do with mental health.

I presume that this lady is going to admit that Dr. Treadway is a recognized expert, and I intend to ask her whether or not her opinion coincides with the expert.

The Court: Out of the matter that we are trying? Have anything to do with the matter we are trying?

Mr. Burch: Oh, yes, sir. The whole definition of—I will pass it to the Court for the Court to see.

The part that I have in mind, I believe, is marked A, B, I believe, if Your Honor please.

(Thereupon, the said document was passed to the Court.)

The Court: Has the state looked at the sections he has?

Mr. Richardson: I did not look at them at all. I didn't know what he was referring to.

The Court: I am noting the two places. All I am looking at is the two places.

Mr. Richardson: I will be glad to look at them, Your Honor. I was reading the whole letter.

(Thereupon, the said document was passed to counsel.)

Mr. Burch: If Your Honor please, while the General is looking at that—Mr. Sheriff, would you pass this to the Court, please?

The second paragraph is something else I intend to ask her about is from a speech of Dr. Fidelholtz to the Memphis and Shelby County Bar Association, the bottom paragraph.

This is the only one I am going to ask her, General, is right here (indicating).

Mr. Patterson: May it please the Court, I would still object on the basis of the letter and the statement here that it is immaterial to the lawsuit.

The Court: The Court agrees with you, General.

Sustain the objection.

Mr. Burch: We respectfully except to Your Honor's ruling.

May I mark the first excluded Exhibit 1?

The Court: How did we do the other one?

The Clerk: Eighteen.

The Court: Let's just stay with the record. Mark that 19.

We might note that for the specific purpose as the first excluded exhibit, and No. 20, the second excluded exhibit.

We will just run continually with the exhibit numbers.

Mr. Burch: Now, if Your Honor please, I will ask the Court to instruct the jury to disregard Mrs. Owensby's remark that she assumes that if the Court had paid any attention to the August report of the two psychiatrists that it would not have sent the defendant up for examination.

The Court: All right, sir. That was not responsive to the question and the Court does not feel that it is a matter for the jury's consideration.

The jury is instructed to disregard that remark with reference to the purpose in the Court sending—Mrs. Owensby's opinion about why the Court sent Mr. Edwards to Central State.

Do you understand, gentlemen?

(Thereupon, the jury indicated an affirmative response to the question of the Court.)

The Court: You are to disregard it. You are not to consider it. You are not to consider that for any purpose whatever.

By Mr. Burch

Q. Now, Mrs. Owensby, does the difference in the issue that is presented by the question of present insanity and not guilty by reason of insanity? A. I think I know this.

Q. Now, isn't it part of your knowledge, and didn't you tell me this on the telephone when you were explaining Dr. Fidelholtz' testimony, that the only reason that he was sent up there and the only reason that you evaluated him was to determine the issue of present insanity and not the question or the issue of not guilty by reason of insanity? A. That is right. When I was talking to you about that, I was not aware of how the Court order actually read. You see Courts do ask all of the questions of present insanity, and we routinely only answer that question in our staff report.

Q. You did tell me that? A. Uh-huh.

Q. That was routine? A. Uh-huh.

Mr. Burch: That is all.

The Court: Thank you.

(Witness Excused)

The Court: Any further rebuttal?

APPENDIX N

DEFENDANT'S SPECIAL REQUEST NO. 15

I charge you that, if you find that the defendant, at the time of shooting his sister, was legally insane, and therefore return a verdict of not guilty by reason of insanity, Tennessee law provides a procedure by which the defendant may be committed to a state mental hospital, if the Court finds that the individual is mentally ill and (1) because of his mental illness he is likely to injure himself or others if he is not hospitalized, or (2) is in need of custody, care or treatment in a mental hospital and, because of his illness, lacks sufficient thought or capacity to make responsible decisions with respect to his hospitalization. Within thirty (30) days after the admission of the defendant into the hospital, the superintendent of the hospital is required to certify to the Court whether or not the conditions which required his hospitalization still exist. If so, the defendant will be detained in the hospital and the superintendent is required to cause him to be examined as often as practicable, but not less often than every six (6) months. The Court may at any time, on the basis of reports to the Court by the superintendent and such further inquiry as the Court considers appropriate, order indeterminate hospitalization or dismissal. The order of hospitalization shall state whether the defendant shall be detained for an indeterminate or for a temporary period and, if for a temporary period, then for how long.

Denied.

DEFENDANT'S SPECIAL REQUEST NO. 5

I charge you that, if you find that the defendant, at the time of shooting his sister, was legally insane, and therefore return

a verdict of not guilty by reason of insanity, Tennessee law provides a procedure by which the defendant may be committed to a state mental hospital for custody, care, and treatment. The period of such treatment is a matter for the Court and the superintendent of the state mental hospital.

Denied 2 21 73.

DEFENDANT'S SPECIAL REQUEST NO. 4

I charge you that, if you find that the defendant, at the time of shooting his sister, was legally insane, and therefore return a verdict of not guilty by reason of insanity, Tennessee law provides a procedure for requiring that the defendant receive such hospitalization, care, and treatment as may be deemed necessary by the Court and the Superintendent of the State Mental Hospital.

Denied.

DEFENDANT'S SPECIAL REQUEST NO. 2

I charge you that, in determining whether the defendant is guilty or not guilty by reason of insanity, you should consider only the defendant's state of mind at the time of the act, and you should not consider or concern yourself with the consequences of your verdict. The consequences of the vedict and the treatment and care of the defendant after the verdict is a matter for the Court to handle under the law of the State of Tennessee.

Denied 2 21 73.

DEFENDANT'S SPECIAL REQUEST NO. 1

I charge you that, if you find that the defendant, at the time of shooting his sister, was legally insane, and therefore return a verdict of not guilty by reason of insanity, the subsequent treatment of the defendant is a matter for the Court and for the appropriate officials of the state mental hospital.

Denied 2 21 73.

Supreme Court, U. S.
FILED
DEC 20 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-533

GEORGE S. EDWARDS,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to Petition for Writ of Certiorari to the Supreme Court of Tennessee

JOHN F. SOUTHWORTH, JR.
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

Of Counsel
E. BROOKS McLEMORE, JR.
Attorney General
State of Tennessee

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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BRIEF

In Opposition to Petition for Writ of Certiorari to the Supreme Court of Tennessee

The respondent, State of Tennessee, respectfully submits that the petition for writ of certiorari filed in this case should be denied.

OPINIONS BELOW

Respondent adopts petitioner's reference to the opinions below with the following addition. The opinion of the Tennessee Supreme Court, including the opinion on petition to rehear, is now published as *Edwards v. State*, 540 S.W.2d 641 (Tenn. 1976).

JURISDICTION

Respondent adopts petitioner's jurisdictional statement.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent adopts petitioner's statement of the constitutional provisions involved.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are restated as follows:

1. Is there any evidence to support the jury's determination that petitioner was sane at the time he committed the offense? (Questions I and IV)

2. Did the trial judge's instructions concerning reasonable doubt, the M'Naghten rule, and the effect of a not guilty by reason of insanity verdict deny petitioner due process? (Questions II, III and V)

3. Did the trial judge's refusal to allow petitioner's counsel to argue the effect of a not guilty by reason of insanity verdict on voir dire deny petitioner due process? (Question V)

STATEMENT OF THE CASE

"Petitioner, George S. Edwards, was indicted for murder in the first degree for the June 7, 1972 killing of his sister, Elizabeth (Betty) A. Edwards. Petitioner admitted he had shot and killed his sister on the date alleged in the indictment, and interposed the defense of insanity at the time of commission of the act. The

jury found petitioner guilty of murder in the second degree and fixed his punishment at ten years in the penitentiary, and sentence was pronounced accordingly. On appeal to the Court of Criminal Appeals, the majority of the Court found petitioner's thirty-six (36) assignments of error to be without merit and affirmed the conviction. One member of the Court of Criminal Appeals dissented, he being of the opinion that the evidence preponderated against the jury's finding on the issue of insanity. [The Tennessee Supreme Court] granted certiorari to consider all assignments of error, and particularly to determine whether the evidence preponderated against the jury's verdict." *Edwards v. State*, 540 S.W.2d 641, 644 (Tenn. 1976). (Portion in brackets supplied.)

The Tennessee Supreme Court, with two members dissenting, held that the evidence did not preponderate against the jury's verdict. The dissenters disagreed with the effect of certain evidence on the issue of sanity, but not with the established rule on insanity (the M'Naghten rule) used in Tennessee, nor with the respective burdens placed on the parties under this rule.

From this decision of the Tennessee Supreme Court, the petitioner seeks review by writ of certiorari.

REASONS FOR DENYING THE WRIT

I

There Is Evidence to Support the Jury's Verdict.

The test in Tennessee for determining sanity at the time of the commission of the act is the rule of *M'Naghten's Case*, 1 C. & K., 130; 10 CL. & f. 200, 8 Eng. Rep. 718 (H.L. 1843). *See Spurlock v. State*, 212 Tenn. 132, 368 S.W.2d 299 (1962).

The rules of procedure in cases in which the issue of sanity at the time of the commission of the crime is contested were concisely set down in *Collins v. State*, 506 S.W.2d 179 (Tenn. Crim. App. 1973).

> The applicable principles of law were settled long ago in this State. The presumption of sanity places the burden of showing insanity at the time of commission of a crime upon him who asserts it as a defense. Mullendore v. State, 183 Tenn. 53, 191 S.W.2d 149; Spurlock v. State, 212 Tenn. 132, 368 S.W.2d 299.
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> While the State is not bound to establish the defendant's sanity in the first instance, if the defendant's or the State's evidence raises a reasonable doubt as to the defendant's sanity, such evidence relieves the defendant of further proof upon that issue and shifts the burden of proof to the State. Stuart v. State, 60 (1 Baxt.), Tenn. 178; King v. State, 91 Tenn. 617, 20 S.W. 169.
>
> Whenever testimony is introduced countervailing the presumption of sanity and raising a question of the accused's insanity, the State must then establish his sanity to the satisfaction of the jury beyond a reasonable doubt. Jordan v. State, 124 Tenn. 81, 135 S.W. 327; Davis v. United States, 165 U.S. 373, 378, 17 S.Ct. 360, 362, 41 L.Ed. 750, 754.

> Neither the defendant's professed inability to remember the crime, Burton v. State, 217 Tenn. 62, 394 S.W.2d 873 nor the enormity of the crime, Ashby v. State, 124 Tenn. 684, 718, 139 S.W. 872, is alone proof of insanity.
>
> Of course, it is settled beyond question that the weight and value of expert testimony is for the jury and must be received with caution, and that where there is any conflict between expert testimony and non-expert testimony as to determinative facts, the jury is not bound to accept expert testimony in preference to other testimony and must determine the weight and credibility of each in the light of all the facts shown in the case; and that insanity as a defense in a criminal prosecution is a question of fact to be determined by the jury *under proper instructions by the court*. Sparkman v. State, Tenn. Cr. App., 469 S.W.2d 692.
>
> 506 S.W.2d at 183-184.

The M'Naghten test was held to be constitutional by this Court in *Leland v. Oregon*, 343 U.S. 790, 800-801 (1952). This Court also held in that case that the Oregon rule requiring a defendant to prove his sanity at the time of the commission of the offense beyond a reasonable doubt as long as the State retained the burden of proving each element of the crime charged beyond a reasonable doubt was constitutional. Certainly, the Tennessee procedure set out above meets constitutional standards.

Petitioner in the instant case does not directly question the constitutionality of the Tennessee law on this subject. Rather the gravamen of his argument is that the burden of the State was not met in this case.

In its opinion in this case, the Tennessee Supreme Court summarized the conflict in the evidence on the issue of insanity in the following language.

Petitioner insists the state failed to carry its burden and that the evidence preponderated against the jury's finding that petitioner was sane at the time of the killing. Implicit in petitioner's argument is the insistence that the testimony of the psychiatrists on this issue must be accepted over lay testimony. Petitioner also stresses the testimony of his wife and family concerning his disturbed mental condition in the days before the killing and the history of mental illness in his family, and the lack of an apparent motive for his actions. . . .

In weighing the testimony of the [defendant's two] psychiatrists in this case [who stated that he was insane], the jury was faced with the fact that neither saw the petitioner on the day of the shooting. Dr. Walker saw the petitioner five days before the shooting and did not consider petitioner's mental condition serious enough to require treatment other than the taking of tranquilizers. The next time he saw petitioner was two days after the killing and Dr. Walker testified that petitioner was not psychotic at that time. Dr. Aivazian first saw petitioner five days after the killing and testified that petitioner was not psychotic at that time or at any other time he saw petitioner. On the other hand, lay witnesses who saw petitioner before the shooting testified that petitioner appeared normal and capable of distinguishing between right and wrong. And even more significant than testimony of the lay observers was the fact that before the police arrived on the scene, petitioner telephoned his mother and told her that he had shot Betty and was sorry. (Portions in brackets supplied.)

Edwards v. State, supra, at 646-647.

The jury, the trial judge, the Tennessee Court of Criminal Appeals, and the Tennessee Supreme Court have disagreed with the contention of petitioner that he was insane at the time he killed his sister. No interest covered in Rule 19, Supreme Court Rules, would be served by a further review of the evidence in this case.

II

The Trial Judge's Instructions Were a Correct Statement of Constitutionally Valid Legal Principles.

A. Reasonable doubt.

The trial judge's instructions concerning reasonable doubt (T. 764) are a correct statement of Tennessee law. *See State v. Moss,* 106 Tenn. 359, 61 S.W. 87 (1901); *Odeneal v. State,* 128 Tenn. 60, 157 S.W. 419 (1913). Therefore, there was no error in this regard.

B. The M'Naghten Rule.

The petitioner is satisfied with at least one statement of the M'Naghten Rule made by the trial judge. (Pet. at p. 70). On this one page of the record the trial judge at least six times made reference to the defendant being required to understand the difference between right and wrong and also the nature and quality of his acts.

In this petition, petitioner complains that the trial judge did not fully instruct as to this element of the M'Naghten rule. However, any error that might have been made by the trial judge earlier in his charge as to the M'Naghten rule was cured by his repeated charge on this point just mentioned.

C. Not Guilty Verdict Effect.

In Tennessee, no special consequences attach to a verdict of not guilty if that verdict is based on a finding of insanity. *Ed-*

wards v. State, supra at 648-649. While Tenn. Code Ann. § 33-709 allows the district attorney general to seek commitment of such a person, this is not mandatory. *Edwards v. State, supra,* at 649. Since the testimony at trial was to the effect that petitioner was sane at the time of the trial, any instruction on this issue would have been highly speculative. If any error was made, it does not rise to a constitutional level.

III

The Voir Dire Examination Was Not Unconstitutionally Restricted.

Petitioner complains that he was not allowed during the voir dire of the jury to discuss the consequences of a verdict of not guilty by reason of insanity.

In *Smith v. State,* 205 Tenn. 502, 327 S.W.2d 308 (1959), the following rules for the scope of voir dire were set down.

> A voir dire examination is for the purpose of advising counsel of the juror's qualification, interest, or bias, as a matter of fact, presupposing his statutory competence, that is, age, residency, etc. The subjacent purpose is to enable the exercise of one's peremptory challenges. *Leach v. State,* 31 Ala. App. 390, 18 So. 2d 285. In this process, it has been held, and it seems to us fairly so, that proper fields of inquiry include the juror's occupation, habits, acquaintanceships, associations and other factors, including his experiences, which will indicate his freedom from bias. *People v. Pers,* 362 Ill. 298, 199 N.E. 812; *Watson v. City of Bozeman,* 117 Mont. 5, 156 P.2d 178; *United States v. Mesarosh,* D.C., 116 F.Supp. 345.
>
> 205 Tenn. at 524-525, 327 S.W.2d at 318.

This is an adequate scope of examination for empaneling "a panel of impartial 'indifferent' jurors." *Irvin v. Dowd,* 366 U.S. 717 (1961); *Murphy v. Florida,* 95 S.Ct. 2031 (1975). It was adhered to in this case. There was no constitutional error.

CONCLUSION

For the foregoing reasons, the State of Tennessee respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN F. SOUTHWORTH, JR.
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-7087